Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

CLASS FIVE NEVADA CLAIMANTS,
Petitioner,

v.

DOW CORNING CORPORATION, DEBTOR; OFFICIAL COMMITTEE OF TORT CLAIMANTS; THE DOW CHEMICAL COMPANY; CORNING, INCORPORATED; ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Sixth Circuit err in holding, in a non-asbestos case, that a bankruptcy court is empowered to confirm a chapter 11 plan providing for the discharge of a third party's state law liability to a non-consenting creditor?

Parties to the Court of Appeals Proceeding and corporate disclosure statement.

The Sixth Circuit's judgment (App 27a) determined all appeals from the district court's November 13, 2000 decision and judgments (App 38a) affirming in part and reversing in part the bankruptcy court's November 30, 1999 order confirming plan. Appeals from each of the district court's November 13 judgments were given separate case numbers by the Sixth Circuit and were consolidated by that court for purposes of briefing and submission (and argument) only. (App 30a).

The confirmed plan created a Class Five consisting of breast implant claimants. The Class Five Nevada Claimants' appeal before the Sixth Circuit was case 00-2516. The 55 women, comprising the Class Five Nevada breast implant claimants listed in Appendix 336a, were the only appellants in that appeal, and constitute the petitioners herein. Appellants in the other appeals of the district court's November 13 judgments, all partially consolidated with the Nevada Claimants' appeal, some breast implant claims and some not, were Janet S. Lacy, individually and on behalf of her minor child, Andrea Lane Atherton; Jama Nmi Russano, individually and as guardian for Richard Todd Russano; Michael Nmi Russano; Andrea Lane Atherton, Claimant, a minor; Richard Todd Russano, a minor (00-2517); 1,300 Australian Tort Claimants (00-2518); Martha S. Jacobs (00-2520); Helen D. Schroeder 00-2521); Beatrix Shishido (00-2522); Pennsylvania Coordinated Silicone Breast Implant Litigation (00-2523 ; Karen L. Hustead (00-2524); Certain Foreign Claimants (00-2525); Hartford Accident And Indemnity Company; Hartford Fire Insurance Company; Nutmeg Insurance Company; First State Underwriters Agency Of New England Reinsurance Corporation; Twin City Fire

Insurance Company; Excess Insurance Company; First State Insurance Company (01-1001); United States Of America (01-1102); New Zealand Claimants (01-1349).

The Appellees in petitioners' appeal before the Sixth Circuit were Dow Corning Corporation, Debtor; Official Committee Of Tort Claimants; The Dow Chemical Company; Corning, Incorporated; Official Committee Of Physician Creditors; Hartford Accident And Indemnity Company; Hartford Fire Insurance Company; Nutmeg Insurance Company; First State Underwriters Agency Of New England Reinsurance Corporation; Twin City Fire Insurance Company; Excess Insurance Company; First State Insurance Company; Certain Lloyds Of London Underwriters; Certain London Market Insurance Companies. These parties were also the appellees in the partially consolidated appeals taken by non-Nevadans, mentioned above.

None of the petitioners is either publicly held or affiliated with an entity that is. The Debtor is not publicly held. Petitioners do not know whether debtor is affiliated with an entity that is. One or more of the other respondents may be publicly held or affiliated with an entity that is so held. Petitioners understand that the stock of respondents Dow Chemical and Corning, Inc. is publicly traded.

Certiorari to review other issues has been denied twice before in this case.[1]

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[1] *In Re Dow Corning Corporation*, 86 F.3d 482, 36 C.B.C.2d 218 (CA 6. 1996), cert. den. 117 S.Ct. 718 (*Pacor* issue-see p 19 of this Petition). *In re: Dow Corning Corporation*, 113 F.3d 565 (6th Cir., 1997), cert. den. 522 U.S. 977 (abstention issue).

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Petition for a Writ of Certiorari

Petitioners Tiffany Williams, Judy Lieb, Sherann (Christy) Scott and the other 50 Nevada Class Five Nevada breast implant claimants (herein the "Class Five Nevada Claimants," and "Nevadans"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Opinions and Orders Below

The opinion of the United States Court of Appeals for the Sixth Circuit (App 1a) is reported at 280 F.3d 648. The amended opinion of the district court (App 37a) is reported at 255 B.R. 445. The district court's order of dismissal is at App 338a. The district court's order denying reconsideration is at Appendix p. 32a. The bankruptcy court's Order Confirming Plan is at Appendix 318a, and its Findings of Fact and Conclusion of Law at Appendix 309a. The bankruptcy court's Opinion on Best Interests and Whether the Plan Complies with the Applicable Provisions of Title 11 (App 238a), being the last of its confirmation opinions[2], is reported at 244 B.R. 721. Paragraphs 8.1-8.4 of the plan are at App. 327a.

The plan and disclosure statement has, with permission of the court, been lodged, as have the bankruptcy court's other opinions explicating its Order Confirming Plan: the amended classification opinion, containing a general overview of the plan, reported at 244 B.R. 634; the amended opinion on good faith, reported at 244 B.R. 673; the opinion on cramdown of commercial claims, reported at 244 B.R. 678; the Norplant cramdown opinion, reported at 244 B.R. 696; the opinion on cramdown of government claims, reported at 244 B.R. 705, and the opinion on the taxing authorities'

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[2] The bankruptcy court's confirmation opinions are set forth sequentially in volume 244 B.R, beginning at p 634 and ending at p 754.

objections, reported at 244 B.R. 718.

Jurisdiction

The United States Court of Appeal's judgment was filed January 29, 2002. (App 1a).

There is cause for this court to deviate from its normal practice and allow this petition under Rule 11, should it be pre-mature under Rule 13. The judgment, among other things, remanded the case to the district court for additional findings on the third party discharge issue. (App 27a). This remand itself was outside the court's jurisdiction [the remand calls on the trial court to exercise powers it doesn't have]. Further, the requested additional findings are unnecessary to the determination of this case or this petition, and merely force the 175,000 breast implant claimants in this case to continue indefinitely a wait that, when combined with their 3 year pre-bankruptcy wait in MDL-926 (App 45a), is now approaching 10 years. During this wait, their claims against the third parties, which bear no interest, have been stayed. Some petitioners have died, as have witnesses in their underlying cases. Immediate review is warranted.

Petitioners, in their partially consolidated case 00-2516, did not file for rehearing. Mandate issued on 2/20/02 in the petitioners' and all other non-governmental appeals. (App 28a).[3] If this petition is not pre-mature under Rule 13, review is requested under that rule.

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[3] When this petition was originally filed, petitioners were concerned that the Government's then pending petition for rehearing en banc in partially consolidated case 01-1102 may have rendered it premature. However, the government's petition was denied on May 3, 2002.

This Court has jurisdiction over this petition under 28 U.S.C. § 1254(1)

Constitutional and Statutory Provisions Involved

"The Congress shall have Power . . . to establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, §8, clause. 4.

"The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." 11 U.S.C. § 105(a).

"Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e).

"(1)(A) After notice and hearing, a court that enters an order confirming a plan of reorganization under chapter 11 may issue, in connection with such order, an injunction in accordance with this subsection to supplement the injunctive effect of a discharge under this section.

. . .

(B) The requirements of this subparagraph are that--

(i) the injunction is to be implemented in connection with a trust that, pursuant to the plan of reorganization--

(I) is to assume the liabilities of a debtor which at the time of entry of the order for relief has been named as a defendant in personal injury,

> wrongful death, or property-damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products;
>
> . . .
>
> (4)(A)
>
> . . .
>
> (ii) Notwithstanding the provisions of section 524(e), such an injunction may bar any action directed against a third party who is identifiable from the terms of such injunction . . ." 11 U.S.C. § 524(g).

"Subject to subsection (a) of this section, a plan may–

. . . (6) include any other appropriate provision not inconsistent with the applicable provisions of this title." 11 U.S.C. § 1123(b).

"The court shall confirm a plan only if all of the following requirements are met: (1) The plan complies with the applicable provisions of this title." 11 U.S.C. § 1129(a).[4]

"(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan–

> (A) discharges the debtor from any debt that arose before the date of such confirmation . . ." 11 U.S.C. § 1141(d)

Statement of the Case

This is a case about abuse of the federal bankruptcy power . . . abuse not by the Article I bankruptcy judge, who

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[4] "Code" means Title 11, U.S.C. All reference to statutory provisions are to 11 U.S.C. unless otherwise noted.

held that the plan confirmation provisions of the Code did not empower him to abrogate state laws enabling non-consenting breast implant claimants to seek damages from third parties, but rather abuse by the Article III courts who reversed.

About half the circuits that have considered the matter allow bankruptcy courts to discharge third parties as part of the plan confirmation process, about half do not. In their attempts to do equity, those circuits which hold that bankruptcy courts have power to permanently enjoin third party actions are doing just the opposite. This case is a good example. Though a chapter 11 plan should normally be confirmed within 6 months of the petition date (11 U.S.C.§ 1121(c)), when a confirmation court must consider whether "unusual circumstances"[5] justify a third party discharge, it is all but impossible to meet the 6 month deadline. This case was filed May 15, 1995. In January of 2002, the Sixth Circuit remanded the case to the bankruptcy court for additional findings regarding those "unusual circumstances."

The facts governing this petition are undisputed[6]. For nearly thirty years, Debtor was this country's predominant producer of silicone gel breast implants. In addition, Debtor supplied silicone raw materials to other manufacturers of silicone gel breast implants.

In 1992, the Food and Drug Administration, citing serious health concerns, ordered that silicone gel implants be

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[5] Even though the trial court eventually found the evidence irrelevant, it nonetheless took much evidence on the third party discharge issue.

[6] For purposes of the petition, the facts as stated by the Sixth Circuit (App 4a) are accepted and largely here repeated. When other facts are added, reference to the appropriate portion of the Appendix is made.

taken off the market, and debtor ceased manufacturing its silicone implants. Tens of thousands of implant recipients sued debtor and, on independent claims, the Dow Chemical Company, claiming to have been injured by auto-immune reactions to the silicone in their implants.

The subsequent consolidated litigation of these claims in 1992 led to a proposed $4.2 billion global settlement, which the multidistrict litigation court approved in 1994. See *Lindsey v. Dow Corning Corp. (In re Silicone Gel Breast Implant Prods. Liab. Litig.)*, 1994 U.S. Dist LEXIS 12521, No. CV 92- P-10000-S, Civ. A. No. CV94-P-11558-S, 1994 WL 578353, at 1 (N.D. Ala. Sept. 1, 1994).See also *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 793 F. Supp. 1098 (J.P.M.L. 1992). The settlement collapsed in 1995, whereupon debtor filed a petition under chapter 11 of the Bankruptcy Code. Out of the 175,679 domestic and foreign Class Five Claimants eligible to vote on the plan, 122,774 actually voted, and of those who voted, 107,660 voted in favor of confirmation. (App 139a and App 340a). Each of the Nevadans herein voted against the plan. (App 276a). The Nevada Supreme Court has determined that Nevada breast implant creditors have separate and independent claims against both the debtor and Dow Chemical, and that their claims against Dow Chemical are not derivative. (App 398a) *(Dow Chemical v. Mahlum*, 970 P.2d 98 (1998), reh den. 973 P.2d 842 (1999)). Most of the breast implant creditors voting to confirm the plan are residents of states whose laws give them no rights against Dow Chemical[7]. (See also App 342a).

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[7] Though debtor's culpability is well established (See *Hopkins v. Dow Corning Corp.*, 33 F. 3d 1116 (9th Cir. 1994) cert. denied, 513 U.S. 1082 (1995)), the bankruptcy court made no finding as to how many of the claimants had rights under the laws of their states against Dow Chemical or Corning Inc. Some courts allow such suits against Dow Chemical (*In*

Plan proponents' "parade of horribles" argument, their fear that "thousands" of suits against Dow Chemical would be brought if the bankruptcy court's order of confirmation is affirmed (App 105a) (if there is no third party discharge as to non-consenting claimants), is completely unfounded. Even without confirmation it is safe to say that, whatever the number, it is significantly smaller than the number of breast implant creditors with rights against both Dow Chemical and debtor. And with the confirmation, less than 6% of the voting claimants in this bankruptcy now have rights against Dow Chemical, even without the third party discharge. And only a minuscule portion of that 6%, 55 Nevadans and a few hundred others, are probably all that would proceed against Dow Chemical. The balloting results show that over 94% of those voting, being presumably all creditors with substantial claims, voted in favor of the plan. (App 340a). The bankruptcy court "completely credited" Fred Dunbar's estimate that fewer than 7,514 of the claimants would not accept the terms of the settlement offered under the plan. (App 97a). Dow Chemical should not be heard to disagree with the proponents' witness now.

The trustee in bankruptcy appointed several committees to represent the differing interests of debtor's claimants during the development of debtor's plan of reorganization. Primarily because of the third party release provisions, the Tort Claimants' Committee vigorously

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re Silicone Gel Breast Implants Prods. Liab. Litig., 887 F. Supp. 1455 (N.D. Ala. 1995) (holding that the foreseeability of harm to third persons alone may be sufficient to create a duty to the third persons), *Mahlum*, supra. Some of the larger states don't. *(See In re New York State Silicone Breast Implant Litig.*, 642 N.Y.S.2d 681 (App. Div. 1996), *Artiglio v. Corning Inc.*, 18 Cal. 4th 604, 957 P.2d 1313,1318 (Cal. 1998)

opposed debtor's first two proposed reorganization plans[8]. Debtor then entered into mediation with the committees, and on February 4, 1999, debtor and the Tort Claimants' Committee together submitted an Amended Joint Plan of Reorganization, containing a third party release, to the bankruptcy court. On November 30, the bankruptcy court confirmed the plan. (App 238a). Under the plan, a $2.35 billion fund is established for the payment of claims asserted by (1) personal injury claimants, (2) government health care payers, and (3) other creditors asserting claims related to silicone-implant products liability claims. The Sixth Circuit found that the $2.35 billion fund is established with funds contributed by debtor's products liability insurers, debtor's shareholders and debtor's operating cash reserves and, that as a quid pro quo for making proceeds available for the $2.35 billion fund, section 8.3 of the plan releases debtor's insurers and shareholders from all further liability on claims arising out of settled personal injury claims, and section 8.4 permanently enjoins any party holding a claim released against debtor from bringing an action related to that claim against debtor's insurers or shareholders. (App 7a), Plan §§ 8.3, 8.4.

Claimants who choose to settle are channeled to the Settlement Facility, a legal entity created by the plan and authorized to negotiate payments out of funds set aside for that purpose. Claimants who choose to litigate are channeled to the Litigation Facility, a legal entity created by the plan that is essentially substituted for debtor as a defendant in the claimant's lawsuit.

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[8] The Nevadans were not invited to these negotiations and did not participate in them.

The plan divides claims and interests into thirty-three classes and subclasses. The plan provides for payment of allowed breast implant claims by the debtor over a period of approximately 10 years, revenues permitting. It is subject to a $2.35 billion dollar overall cap with up to $400,000,000 of that (and no more) being set aside for claimants who do not accept the plan's settlement provisions. (App 247a) Any portion of the $2.35 billion not used to pay claims is returned to the debtor. The plan states that debtor's shareholders, including Dow Chemical, are making a contribution to the plan, which the bankruptcy court called "important." (App 315a). The bankruptcy court did not find that the third party discharge provisions were essential to reorganization, but did find them "essential to reorganization pursuant to this plan" (App 315a) (emphasis added).

The bankruptcy court determined that any authority it might have under the Bankruptcy Code to enjoin a non-consenting creditor's claims against third parties could only be exercised where not inconsistent with non-bankruptcy law. As a permanent injunction barring the Nevadans and those with similar third party claims was inconsistent with state law, and as he also thought a "release" could not be forced on creditors who did not consent to the plan, the bankruptcy judge found such injunctions inappropriate as applied to non-consenting creditors. (App 284a). He construed the plan accordingly. (App 286a).

The district court affirmed the bankruptcy court's Confirmation Order but, concluding that it did have authority and, since lack of authority was the reason for its restrictive construction of the third party discharge, reversed the bankruptcy court's interpretation of the release and injunction provisions of the plan. While not expressly disagreeing with the contract interpretation reasoning of the bankruptcy court, the district court held that the third party injunction/release

provisions discharge all liability the shareholders may have to breast implant creditors, consenting and non-consenting.

The Sixth Circuit affirmed the Confirmation Order and agreed with the district court that bankruptcy courts have power to permanently enjoin suits by unpaid creditors against solvent third parties in unusual circumstances. However, the Sixth Circuit held that the findings made by the bankruptcy court were insufficient and therefore remanded the case for further proceedings. (App. 24a).

The bankruptcy court had jurisdiction by reason of the case having been referred to it by the district court, as permitted by 28 U.S.C. § 157(a) (See E.D. Mich. LR 83.50). The district court had jurisdiction of the case and confirmation of the plan pursuant to 28 U.S.C. § 1334(a), and of appeals from the bankruptcy court under 28 U.S.C. § 158(a). The court of appeals had jurisdiction of the district court appeal under 28 U.S.C. § 158(d) and 28 U.S.C. § 1291.

Reasons for Granting the Writ

The propriety of third party discharge[9] provisions in

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[9] The term "third party discharge" as used herein generally include "non-debtor" discharges and any injunction which permanently enjoins a creditor from seeking payment of his or her claim from a third party or non-debtor. It includes "release" as defined in ¶ 8.3 of the plan, and "non-debtor release" to the extent that such releases are forced upon creditors in a plan which they have not accepted. It also includes "Permanent Injunction Against Prosecution of Released Claims" as used in ¶8.4 of the plan. On the other hand, a "third party release" is used to denote a release or an injunction deemed accepted by voting for the plan. "Permanent Third Party Injunction" is still used in this Petition to describe injunctions issued as part of the plan confirmation process which stop short of discharging the released party's debt, such as the injunction issued in *In re Pws Holding Corporation*, 228 F.3d 224 (3rd Cir., 2000), which

chapter 11 bankruptcy plans is subject to fundamental and long standing differences in the circuits, based on differences in the way they view the powers of a bankruptcy court. In light of the constitutional requirement that the nation's bankruptcy law be uniform, *Railway Labor Executives' Assn. v. Gibbons*, 455 U.S. 457 (1982), the conflict approaches constitutional dimensions.

Since this court's decision in *Ortiz v. Fibreboard Corp.*, 119 S.Ct. 2295 (1999), prohibiting solvent third parties from discharging their liability to members of a mandatory Rule 23 class by creating a false, non-market tested "limited fund," and forcing class members to resort thereto, similarly situated third parties have turned to bankruptcy courts and particularly chapter 11 in an end run attempt to do the same thing. Yet third party discharges in chapter 11 cases are subject to each and every problem that convinced this court to prohibit the third party discharge charade in *Ortiz*.

The Writ should also be granted because the Sixth Circuit's decision on this issue conflicts with this court's opinion in *Callaway v. Benton*, 336 U.S. 132, 69 S. Ct. 435, 93 L. Ed. 553 (1949) and *United States v. Energy Resources Co.*, 495 U.S. 545 (1990), discussed below.

Finally, the Sixth Circuit's decision clothes a bankruptcy court, otherwise completely without power to do so, with power to enter orders effectively reversing the Nevada Supreme court's *Mahlum* precedent, that Dow Chemical is directly liable to the Nevadans, on a negligent undertaking theory, under Nevada law for personal injuries they suffered by reason of debtor's defective breast implants.

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limited the liability of committee and estate professionals to liability for willful misconduct and gross negligence but did not discharge them.

(App 343a). As such it is a massive intrusion into matters traditionally left for determination by the states.

This petition basically argues that for Dow Chemical to get a discharge, it had to file its own petition in bankruptcy, and that since it did not do so, the Sixth Circuit must be reversed. For a corporation, its officers, directors and shareholders to obtain a bankruptcy discharge in the Ninth, Tenth or Fifth circuits, the corporation and each officer, director or shareholder who wants a discharge must file his own individual bankruptcy. However the same corporation, by filing its chapter 11 petition in the Second, Fourth and now Sixth circuits may obtain a discharge of significant debt in favor of not only the corporation, but also its officers, directors and others, without the officers etc. ever having to file bankruptcy.

The theory behind chapter 11 is that it is in the national interest to keep a corporation going under certain circumstances, that the whole is worth more than the sum of its parts.

> The purpose of Chapter 11 reorganization "is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders." H.R. Rep. No. 595 (1975), reprinted in 1978 U.S.C.C.A.N. 6179.

In re Cedar Shore Resort, Inc. 235 F.3d 375, 379 (8th Cir. 2000)

Yet in the Fourth and other third party discharge friendly circuits, this purpose is thwarted. The debtor's incentive is not to protect itself and its employees and creditors, but rather to protect its officers, directors, shareholders and other friendly entities, none of which Congress intended to protect by way

of chapter 11. Were the recent Enron (01-16034 (AJG)), Global Crossing (02- 40212 et. seq.) and other major international company bankruptcy filings brought in the Second Circuit to protect the creditors or to protect the officers? We don't know: "A debtor's choice of forum is entitled to great weight if venue is proper." *In re Enron*, 274 B.R. 327, 342 (2002). The Second Circuit permits third party discharges. *Drexel Burnham Lambert Group, Inc.* 960 F.2d 285 (2nd Cir. 1992). Enron's home circuit, the Fifth, does not. *Matter of Zale Corp.*, 62 F.3d 746 (5th Cir.(Tex.) 1995). But we do know that both filed in a third party discharge friendly circuits (Southern District of New York) when at least Enron and perhaps Global Crossing should probably have filed elsewhere. And we also know, from experience in the instant case, that if companies such as these file a plan containing provisions discharging their officers from liability for their own direct wrongdoing, most of the confirmation hearing and, as below, millions of dollars in attorney fees and years of delay, will be devoted to the third party discharge matter, a matter which the Code nowhere authorizes the court to consider in the first place.

> All bankruptcy law, however, no matter when or where devised and enacted, has at least two general objects in view. It aims, first, to secure an equitable division of the insolvent debtor's property among all his creditors, and, in the second place, to prevent, on the part of the insolvent debtor conduct detrimental to the interests of creditors. In other words, bankruptcy law seeks to protect the creditors, first, from one another and secondly, from their debtor. A third objective, the protection of the honest debtor from his creditors, by means of the discharge, is sought

> to be attained in some systems of bankruptcy, but this is by no means a fundamental feature of the law.

Levinthal, *The Early History of Bankruptcy Law,* 66 U. of Pa. L. Rev. 223, 224-225 (1918).

> Despite the demonstrated capacity for growth and adaptation which is inherent in the bankruptcy power, and the resulting difficulty of definition, it is clear that there are some things the bankruptcy court cannot do because they have nothing to do with bankruptcy. For example, [to use an archaic and somewhat sexist analogy] though the chief liability of the bankrupt is thought to be his wife, the bankruptcy court cannot strike at the root of his financial troubles by granting him a divorce -- and it is unlikely that Congress, under the bankruptcy power, could authorize the court to do so. Thus the bankruptcy power is restricted not only by other provisions in the Constitution, such as the Due Process Clause, but also by the limitations inherent in the nature of bankruptcy itself. [matter in brackets added]

Hill, *The Erie Doctrine in Bankruptcy*, 66 Harvard Law Review, 1013, 1038 (1953).

Nobody, no reasonable creditor, not least the Nevadans, will easily accept a judicially created rule which takes their state law claim against a very solvent third party and forces them to maintain it, or a version of it, against a bankrupt in a distant bankruptcy court. No reasonable solvent third party, with a chance to discharge substantial claims against it merely by helping a bankrupt in its efforts to pay those claims, will refuse that opportunity, particularly where,

as below, the third party is discharged whether or not the bankrupt ever gets around to actually paying the debt.

In the instant case, it is absolutely certain from the record below that Dow Chemical and Corning Inc., owners of 100% of debtor's stock, will not voluntarily allow their child to emerge from bankruptcy without their third party discharge. The whole case then becomes governed by considerations completely foreign to the Congressional goals behind the enactment of chapter 11 in the first place.

A company's decision to attempt a reorganization under chapter 11, rather than liquidate under chapter 7, is, like venue, also impacted by the third party discharge issue, for it is the very people to be discharged who make the decision to liquidate or reorganize. The decision prompting some of the major recent filings, by typically "dot.com type" companies, companies which have often paid handsome profits to their officers and shareholders without ever turning a profit, to file under chapter 11 rather than 7, may well be primarily motivated by the purpose of protecting those officers. The Code's provisions protecting a shareholder's equity in a solvent debtor (See e.g. §1129(a)(7)(A)(ii)) are as personal as it should get. The Code defines shareholders in a chapter 11 as a class (§ 1123(a)(1), albeit the most junior class (§ 726(a)(6) and § 1129(a)(7)). The Code does not provide shareholders with a right to the additional protection of a third party discharge.

I. Sixth Circuit is in conflict with the decisions of other United States Court of Appeals[10]

A. Circuits holding that §524(e) prohibits third party discharge

Several circuits hold that a bankruptcy court has no authority to confirm a plan containing provisions that discharge a third party. *In re Lowenschuss* 67 F.3d 1394, (9th Cir. 1995); cert.den. *Lowenschuss v Resorts Intern., Inc.* 517 U.S. 1243 (1996)); *Landsing Diversified Properties--II v. First Nat'l Bank & Trust Co. of Tulsa (In re Western Real Estate Fund, Inc.)*, 922 F.2d 592, 601 (10th Cir. 1990); *In re Zale Corporation,* 62 F.3d 746, 761 (5th Cir. 1995). They interpret §524(e) and its predecessors as prohibiting such plans, reasoning that a discharge and a permanent injunction barring creditors from collecting their debts from a third party are, as to the debts involved, one and the same.

> A discharge in a case under this title-
> ...
> (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor...

See §524(a)(2). The debt remains. It just cannot be collected from the debtor. [*Johnson v. Home State Bank*, 501 U.S. 78, 84, 115 L. Ed. 2d 66, 111 S. Ct. 2150 (1991) (holding "...a bankruptcy discharge extinguishes only one mode of enforcing a claim -- namely, an action against the debtor in personam.")] This is consistent with §524(e), which also

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[10] A thorough description of the conflict within the circuits is contained in *In Re: Continental Airlines*, 203 F.3d 203, 212-214, (3rd Cir. 2000).

makes clear that the debt remains after discharge.

§ 524(e) got its start in this country as section 34 of the Bankruptcy Act of 1800. Justice Marshall quotes from it in *Tucker v Oxley*, 9 U.S. 34 (1804), noting that it provided that the bankrupt shall be discharged from all provable debts owed at the time he became a bankrupt:

> Provided that no such discharge of a bankrupt shall release or discharge any person, who was a partner with such bankrupt at the time he or she became bankrupt, or who was then jointly held or bound with such bankrupt for the same debt or debts, from which such bankrupt was discharged as aforesaid.

The sense of this old statute was carried forward in § 16 and § 22(b) of the Bankruptcy Act of 1898. Section 16 stated that "the liability of a person who is a co-debtor with, or a guarantor of or in any matter a surety for, a bankrupt shall not be altered by the discharge of such bankrupt." Section 22(b) provided that a corporation's discharge in bankruptcy "shall not release its officers, the members of its board of directors or trustees or other similar controlling bodies . . . from any liability under the laws of a State or of the United States." As a result of the mandatory language contained in those sections, courts operating under the Bankruptcy Act held that a bankruptcy court had no power to discharge the liabilities of any of the enumerated parties set forth in § 16 or § 22(b). See *Underhill v. Royal*, 769 F.2d 1426, 1432 (9th Cir. 1985); *Union Carbide Corp. v. Newboles*, 686 F.2d 593, 595 (7th Cir. 1982); *R.I.D.C. Indus. Dev. Fund v. Snyder*, 539 F.2d 487, 494 (5th Cir. 1976).

This view, that discharge is a reward achievable only by a debtor, was carried forward in 1978 by §524(e) and more recently received additional support from Congress

when it enacted, §524(g), as part of the Bankruptcy Reform Act of 1994, permitting third party discharges in asbestos cases under tightly controlled circumstances, one being that the creditors own most of the company on confirmation. § 524(g)(2)(B)(i)(II) The enabling legislation (Section 111(b) of Pub.L. 103-394) provides:"Nothing in subsection (a), or in the amendments made by subsection (a) [enacting subsecs (g) and (h) of this section] shall be construed to modify, impair, or supersede any other authority the court has to issue injunctions in connection with an order confirming a plan of reorganization." Still, this new legislation if nothing else clearly shows that Congress considers §524(e) the controlling statute preventing third party discharges, to wit, this new subsection of § 524 provides that third party discharge injunctions are permissible in asbestos cases "Notwithstanding the provisions of §524(e)." See §524(g)(4)(A)(ii).[11]

Those circuits who view the matter controlled by §524(e) are adamant in their view: "This court has repeatedly held, without exception, that §524(e) precludes bankruptcy courts from discharging the liabilities of non-debtors." *In re Lowenschuss* 67 F.3d 1394, 1401 (9th Cir. 1995); cert. den. *Lowenschuss v Resorts Intern., Inc.* 517 U.S. 1243 (1996))

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[11] It is also noted that during the plan confirmation hearing below Bankruptcy Rule 7001 provided that any proceeding to obtain an injunction was an adversary proceeding. However, Rule 7001 was amended, effective November 1, 1999 (the day after the plan below was confirmed), presumably to accommodate §524(g) to provide that an adversary proceeding is "(7) a proceeding to obtain an injunction or other equitable relief, *except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for the relief.*"

B. Circuits finding power even where inconsistent with non-bankruptcy law

The difference in the other circuits is stark. The Sixth Circuit below joined the Fourth in holding that a bankruptcy court has the power to issue a third party discharge as part of the plan confirmation process. In so doing, it acknowledged the conflict and expressly disagreed with the views expressed by the Ninth and Tenth Circuits:

> Nevertheless, some courts have found that the Bankruptcy Code does not permit enjoining a non-consenting creditor's claims against a non-debtor. See In re Lowenschuss, 67 F.3d 1394, 1401 (9th Cir. 1995); In re Western Real Estate Fund, Inc., 922 F.2d 592, 600 (10th Cir. 1990).

(App 12a)

The expansive view of a bankruptcy court's equitable powers adopted below by the Sixth Circuit was earlier approved in the following circuits: *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 94 (2nd Cir. 1988), cert. denied, 488 U.S. 868, 57 U.S.L.W. 3235, 102 L. Ed. 2d 145, 109 S. Ct. 176 (1988). *In re A. H. Robins Co.*, 880 F.2d 694, 702 (4th Cir. 1989), *cert den* 493 U.S. 959; and *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 293 (2nd Cir. 1992)[12].

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[12] Judge Martin, writing for the Sixth Circuit, also stated that the third circuit's *Continental Airlines* case (*Gillman v Continental Airlines*, 203 F.3d. 203 (3rd. Cir. 2000) approved such an expansive view of a bankruptcy court's power. However, it is submitted that the courts in *Continental Airlines* and *In re AOV Indus., Inc.*, 253 U.S. App. D.C. 186, 792 F.2d 1140, 1154 (D.C. Cir. 1986) have yet to finally determine the matter and may well adopt a third approach, similar to that adopted by the bankruptcy court below. "Establishing a rule would provide guidance

These courts find the bankruptcy court's power to issue third party discharges in its general equitable powers, and particularly rely upon §105(a) and 1123(b)(6) of the Code to reach their conclusion that Congress intended the reorganization policies set forth in Title 11 to reign supreme over all other state and federal non-bankruptcy law, that a bankruptcy judge in confirming a plan may unilaterally override any such non-bankruptcy law which might stand in the way of a reorganization if unusual circumstances exist. See *Bankruptcy Injunctions And Complex Litigation: A Critical Reappraisal Of Non-debtor Releases In Chapter 11 Reorganizations*, Brubaker, 1997 U.Ill.L.Rev. 959, 1010, questioning whether this squared "with the inherent limitations of the judicial process and Congress' primary role in making such policy determinations in the bankruptcy context."

These circuits generally find that a bankruptcy court cannot override non-bankruptcy law unless it first finds "unusual circumstances." The Sixth Circuit below noted that this judicially created power was subject to the bankruptcy court finding certain "factors," also judicially created, apparently by a preponderance of the evidence:

> In determining whether there are "unusual circumstances," our sister circuits have considered a number of factors, which are summarized in our holding below. We hold that when the following seven factors are present, the bankruptcy court may enjoin a non-consenting creditor's claims against a non-debtor:
> (1) There is an identity of interests between the debtor and the third party, usually an

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prospectively, but would be ill-advised when we can rule on Plaintiffs' appeal without doing so." *Continental Airlines*, p 214.

> indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate; (2) The non-debtor has contributed substantial assets to the reorganization; (3) The injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor; (4) The impacted class, or classes, has overwhelmingly voted to accept the plan; (5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction; (6) The plan provides an opportunity for those claimants who choose not to settle to recover in full and; (7) The bankruptcy court made a record of specific factual findings that support its conclusions.

Appendix 14a.

Some of these factors are normally thought of as justifying a bankruptcy court's temporary status quo injunction, rather than a permanent third party discharge. For example, both the first ("deplete the assets of the estate") and the third, (need for "debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor") of the Sixth Circuit's factors are nationally accepted *Pacor* justifications for a temporary injunction, which drop out when the case has been administered and is ready for confirmation. *Pacor, Inc. v. Higgins,* 743 F.2d 984 (3rd Cir. 1984). (See also Anti-Injunction Act, 28 U.S.C. § 2283). Not only should they not justify a permanent injunction in any event, they are completely unnecessary at plan confirmation because §1141(d) of the Code provides the debtor with a

discharge on confirmation.

Breast implant, contribution/indemnity, and all other claims are discharged on confirmation, being the whole purpose of confirmation. Whether the amount or the date of payment is unknown is of no moment, for contingent liabilities are still claims (See §101(5)) and all claims are discharged on confirmation. It goes without saying that a discharged claim cannot deplete the estate of the debtor.

The fact that the breast implant claims in this case are contingent did not prevent debtor from discharging them at confirmation and the fact that the indemnity/contribution claims may likewise be contingent does not prevent them from being discharged on confirmation.

Claims of indemnity and contribution were not discharged in this case on confirmation for one reason: Debtor chose not to discharge them. Debtor chose to allow them to survive confirmation because it otherwise would not be able to argue that by reason of contribution/indemnity claims, suits against Dow Chemical would deplete the debtor's estate. §1141(d) gives a debtor the ability to waive discharge of a claim, including contribution/indemnity claims, just as §524(c) gives the chapter 7 debtor the right to waive discharge and reaffirm consumer debts. The Sixth Circuit's factors one and three, supra, in effect require a debtor to waive discharge of claims for contribution and indemnity in order to obtain a discharge of its officers, directors and shareholders. Surely to allow a debtor to bootstrap a discharge of its shareholders only where it chooses to ignore the protections afforded it by §1141 of the code is folly. Such could not have been the intent of Congress. Here, where the shareholder Dow Chemical is a 50% shareholder, the temptation for shenanigans is great, similar to the situation in *Ortiz*.

C. Circuits finding power only where consistent with non-bankruptcy law

There is a third view of this matter in the circuits. The bankruptcy court (App (261a-286a)) followed the lead of *In re Specialty Equipment Co.*, 3 F.3d 1043, 1049 (7th Cir. 1993) and to a lesser extent *In re Continental Airlines*, 203 F.3d 203, 211 (3rd Cir. 2000), courts which disagree with the Ninth Circuit on the effect of §524(e) and disagree with the Second circuit on the power of bankruptcy courts. These circuits find power if the third party discharge is consistent with non-bankruptcy law. This view is consistent with this court's holding in *Callaway v. Benton*, 336 U.S. 132, 69 S. Ct. 435, 93 L. Ed. 553 (1949), and is therefore further discussed in part II, below.

Due process considerations support this approach. It matters not for many bankruptcy purposes whether the debt to be discharged is or is not liquidated. From the debtor's standpoint, there is normally no need to liquidate a debt to be discharged, as the debtor is not responsible to pay it in any event[13]. Likewise, the creditor rarely cares whether the claim is liquidated or unliquidated unless the estate has assets. Thus, the order confirming plan below, discharging thousands of claims against the debtor without the court having first determined the merits of those claims, raises no due process considerations, it being entered pursuant to §1129 of the Code, insuring, basically, that the discharge is in the best interests of the creditors affected.

Whatever the fairness and constitutionality of this to creditors of the debtor, it is patently unfair and

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[13] This was true in *In re Robins*, but is not true in the instant case as the plan provides that all monies not utilized to pay Class Five claimants will revert to the revested debtor.

unconstitutional to give such a discharge to a non-debtor third party. When a discharge is granted a non-debtor, whose assets are not subject to the administration by the bankruptcy court, whose assets are not even known to the bankruptcy court, the concepts involved in deciding thousands of claims against creditors and in favor of the third party, without first hearing those claims and determining their merit, raises serious and obvious due process concerns and smacks of totalitarianism.

The Tort Claimants Committee in this case was appointed to represent the members of the class in its dealings with the debtor. It was not appointed to represent creditors with rights against third parties. A compromise of litigation cannot be imposed upon a party without that party's consent. See, e.g., *Martin v. Wilks*, 490 U.S. 755, 761-62 (1989); *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland,* 478 U.S. 501, 529 (1986). Here, where the settlement was essentially an agreed limited fund, there is a constitutional right to opt out. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). See also *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 124-25 (1994) (O'Connor, J., dissenting) (suggesting that Due Process requires opt-out rights even in a limited-fund class action). The Sixth Circuit denied the Nevadans this right.

The Sixth Circuit's holding that a bankruptcy judge has power to discharge third party nondebtors violates the Bankruptcy Clause of the U.S. Constitution. Only Congress has authority to provide for a distribution/discharge scheme. (Art. 1, ¶ 8, cl. 4). Congress's bankruptcy power

> [e]xtends to all cases where the law causes to be distributed, the property of the debtor among his creditors; this is its least limit. Its greatest, is the discharge of a debtor from his contracts. And all intermediate legislation

> affecting substance and form but tending to further the great end of the subject--distribution and discharge--are in the competency and discretion of Congress.

Hanover National Bank v. Moyses, 186 U.S. 181, 186 (1902).

This court has indicated that a creditor's claim against a debtor can be discharged only if the creditor is permitted to share in the debtor's assets on an equitable basis, with Congress defining the contours of the equitable distribution scheme through duly enacted bankruptcy legislation. See *Kuehner v. Irving Trust Co.*, 299 U.S. 445, 450-56 (1937). The court-manufactured discharge of debts approved by the Sixth Circuit violates the separation of powers principles embodied in the Bankruptcy Clause. The creditor subject to the non-debtor discharge has no recourse to an equitable distribution of the assets of the third party. See *Another Way Of Thinking About Section 105(a) And Other Sources Of Supplemental Law Under The Bankruptcy Code,* Nickles & Epstein, 3 Chap. L. Rev. 7, (2000) (§ 105 is not source of legislative authority and if so is unconstitutional).

II. The Decision Below conflicts with this court's decision in *Callaway v Benton*.

Globalization, the process of eliminating differences in laws that hinder commercial advancement, is the buzz word of our time and one of the fundamental issues now facing mankind: Whether it is better to have 50 states, each with its own laws governing its own residents, or to have one national or even international law governing all conduct. Whether Dow Chemical should be liable under a negligent undertaking theory to Nevada women, but not to California or New York women is a question of federalism. Can Congress, following *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 85 (1982) delegate to an article I judge such

massive power, power to reverse the decisions of the highest courts of the 50 states? Plan confirmation is a core proceeding. See 28 U.S.C. 157(b)(2)(L). These issues were on the horizon in 1949 when *Callaway v Benton*, 336 U.S. 132, 69 S. Ct. 435, 93 L. Ed. 553 (1949) was decided.

If a creditor having two assets files a claim attempting to collect one of them from a debtor, neither the debtor nor his trustee acquires rights in the creditor's other asset. § 541(a), defining property of the estate. It was the same under the Act. *In the Matter of Land Investors, Inc.*, 544 F.2d 925, 930 (7th Cir. 1976) (Citing to page 882 of *Callaway v Benton*.)

It is clear that 1) the debtor did not succeed to any rights of the creditors against non-debtor Dow Chemical (*Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416 (1972)) and 2) in any event the bankruptcy court did not adjudicate the claims of breast implant creditors against either the debtor or the shareholders.

In *Callaway,* the question was whether state law requiring 100% shareholder approval of a sale prevailed over terms of a confirmed plan permitting the sale on majority vote. The court held:

> We do not believe that Congress intended to leave to individual judges the question of whether state laws should be accepted or disregarded, . ." (p 141)

The court also held that the internal management of South Western was not within the bankruptcy court's control (p 144) just as, in the instant case, who the Nevadans choose to sue is not within the bankruptcy court's control. The fact that South Western was a creditor gave the bankruptcy court no control over its internal organization (p 146).

> The bankruptcy power unquestionably gives the Commission and court, working within the

> framework of the Act, full and complete power not only over the debtor and its property, but also, as a corollary, over any rights that may be asserted against it. These rights may be altered in any way thought necessary to achieve sound financial and operating conditions for the reorganized company, subject to the requirements of the Act. The purchase of formerly leased properties does not involve rights asserted against the debtor, however. This Court has said that "The exclusive jurisdiction granted the reorganization court by § 77 (a) is that which bankruptcy courts have customarily possessed." Meyer v. Fleming, 327 U.S. 161, 164 (1946). We conceive the jurisdiction asserted by the district court over a solvent lessor not in reorganization to be an extension of these traditional powers not justified by any provisions of the Bankruptcy Act.
>
> 336 U.S. 147

It is noted that the statutory powers of a bankruptcy court have not changed since *Callaway*, § 2a(15) of the Bankruptcy Act of 1898 being for all intents and purposes the same as § 105(a) and Section 77 (e), giving the reorganization court the sole authority to determine whether the acceptances of the plan have been made or procured "by any means forbidden by law," is at least as enabling as 1123(b)(6).

The Sixth Circuit below did not discuss the differences in the justifications for a temporary versus a permanent injunction, but to some extent merged the two concepts in its seven factors. This is understandable, if not justifiable, because a temporary injunction is to preserve a court's

jurisdiction or to preserve the status quo and there is some question as to what jurisdiction is being preserved and even what is the status quo in chapter 11 reorganizations. *Callaway* did not dwell on these concepts as the plan there had been confirmed. A temporary injunction to preserve the estate until a plan could be confirmed was therefore unnecessary. This is true here too. The plan is confirmed. The bankruptcy court, the district court and the Sixth Circuit have all said so.

> The Bankruptcy Code does not explicitly authorize the release and permanent injunction of claims against non-debtors, except in one instance not applicable here. [Fn 6 - See 11 U.S.C. S 524(g) (establishing procedure for resolving asbestos claims)] Section 105(a) of the Bankruptcy Code supplements courts' specifically enumerated bankruptcy powers by authorizing orders necessary or appropriate to carry out provisions of the Bankruptcy Code. However, section 105(a) has a limited scope. It does not "create substantive rights that would otherwise be unavailable under the Bankruptcy Code." United States v. Pepperman, 976 F.2d 123, 131 (3d Cir.1992). Accord Internal Revenue Service v. Kaplan, 104 F.3d 589, 597 (3d Cir.1997). See generally Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206, 108 S.Ct. 963, 99 L.Ed.2d 169 (1988) (court's equitable powers "must and can only be exercised within the confines of the Bankruptcy Code").

In re Continental Airlines, 203 F.3d 203, 211 (3rd Cir. 2000).

III. The *Decision Below Mistakenly Expanded* the Reach of This Court's Decision in *Energy Resources.*

In *United States v. Energy Resources Co.*, 495 U.S. 545 (1990), the bankruptcy court had issued an order under § 105(a) directing the IRS to abide by provisions in a plan requiring it to apply tax payments first to taxes for which corporate officers were also liable. As here, the creditor had the right to payment from two sources, the debtor and a third party (corporate officer). The debtor owed more tax than the officers owed and provided in the plan that the "trust fund" portion of the tax would be paid first, the plan directing the IRS to so apply payments. The IRS objected. This court examined into the matter and found no law that required the debtor to pay trust fund taxes last and no law requiring the IRS to apply payments to trust fund taxes first. Finding the bankruptcy court order authorized by §105(a) and consistent with non-bankruptcy law, the order confirming plan was affirmed, over IRS objection.

In so doing, this court noted that "[e]ven if consistent with the Code, ... a bankruptcy court order might be inappropriate if it conflicted with another law that should have been taken into consideration in the exercise of the court's discretion." Id. at 550. This is precisely the holding of the bankruptcy court below. That court read *Energy Resources* to hold that "In essence, then, 'propriety' [of a permanent non-debtor injunction] turns on whether these provisions are compatible with non-Code law." (Matter in brackets added). (App 273a). The bankruptcy court determined that non-bankruptcy law did not permit the involuntary "release" of claims, that there was no such thing as an involuntary "release," and that therefore, since the plan "deemed" those releases binding on non-accepting creditors, to that extent, the requested permanent injunction was unauthorized. (App 276a)

The Sixth Circuit disagreed with this view of *Energy Resources*, quoting therefrom the more general wording which noted that "bankruptcy courts, 'as courts of equity, have broad authority to modify creditor-debtor relationships.'" (App 11a)

Holding that § 105 authorizes a bankruptcy court to determine how a creditor must apply payments received from the debtor if benefit to the estate is found, is a far cry from holding that § 105 allows a bankruptcy court to discharge claims due by a third party to a creditor. It is to be remembered that the *Energy Resources* court did not prevent the IRS (Nevadans) from proceeding to collect its debt from the third party officers (Dow Chemical). The IRS was free to collect its debt directly from the third parties if it chose to do so.

Conclusion

For the foregoing reasons, petitioners submit that this Court should grant immediate review in this case to reverse the holding of the Sixth Circuit that a bankruptcy court has power in unusual circumstances to permanently enjoin creditors from proceeding with the collection of their claims from third parties after plan confirmation, and to reverse the holding of that court remanding the case for further findings on the grounds that the remand order calls on the bankruptcy court to exercise powers that it does not have. Petitioners also ask this Court to direct the Sixth Circuit to enter an order directing the district court to affirm the order confirming plan as explicated by the bankruptcy court.

The reasons for immediate review given above, as well as the needs of 175,000 women who have already been kept waiting in the federal system of justice for almost 10 years, render this case of such imperative public importance as to justify deviation from normal appellate practice and require immediate determination in this Court.

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In the

Supreme Court of the United States

CLASS FIVE NEVADA CLAIMANTS,
Petitioner,

v.

DOW CORNING CORPORATION, DEBTOR; OFFICIAL COMMITTEE OF TORT CLAIMANTS; THE DOW CHEMICAL COMPANY; CORNING, INCORPORATED; ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 00-2516/00-2517/00-2518/00-2520/00-2521/00-2522/00-2523/00-2524/00-2525/01-1001/01-1102/ 01-1349

[Filed January 29, 2002]

In re: DOW CORNING CORPORATION,	)
Debtor.	)
CLASS FIVE NEVADA CLAIMANTS (00-2516); JANET S. LACY, individually and on behalf of her minor child, Andrea Lane Atherton; JAMA NMI RUSSANO, individually and as guardian for Richard Todd Russano; MICHAEL NMI RUSSANO; ANDREA LANE ATHERTON, Claimant, a minor; RICHARD TODD RUSSANO, a minor (00-2517); 1,300 AUSTRALIAN TORT CLAIMANTS (00-2518); MARTHA S. JACOBS (00-2520); HELEN D. SCHROEDER (00-2521);	)

BEATRIX SHISHIDO (00-2522); PENNSYLVANIA COORDINATED SILICONE BREAST IMPLANT LITIGATION (00-2523); KAREN L. HUSTEAD (00-2524); CERTAIN FOREIGN CLAIMANTS (00-2525); HARTFORD ACCIDENT AND INDEMNITY COMPANY; HARTFORD FIRE INSURANCE COMPANY; NUTMEG INSURANCE COMPANY; FIRST STATE UNDERWRITERS AGENCY OF NEW ENGLAND REINSURANCE CORPORATION; TWIN CITY FIRE INSURANCE COMPANY; EXCESS INSURANCE COMPANY; FIRST STATE INSURANCE COMPANY (01-1001); UNITED STATES OF AMERICA (01-1102); NEW ZEALAND CLAIMANTS (01-1349),

Plaintiffs-Appellants,

v.

DOW CORNING CORPORATION, Debtor; OFFICIAL COMMITTEE OF TORT CLAIMANTS; THE DOW CHEMICAL COMPANY; CORNING, INCORPORATED;

OFFICIAL COMMITTEE OF)
PHYSICIAN CREDITORS;)
HARTFORD ACCIDENT AND)
INDEMNITY COMPANY;)
HARTFORD FIRE INSURANCE)
COMPANY; NUTMEG)
INSURANCE COMPANY; FIRST)
STATE UNDERWRITERS)
AGENCY OF NEW ENGLAND)
REINSURANCE CORPORATION;)
TWIN CITY FIRE INSURANCE)
COMPANY; EXCESS)
INSURANCE COMPANY; FIRST)
STATE INSURANCE COMPANY;)
CERTAIN LLOYDS OF LONDON)
UNDERWRITERS; CERTAIN)
LONDON MARKET INSURANCE)
COMPANIES,)
)
Defendants-Appellees.)
_____)

JUDGES:
Before: MARTIN, Chief Circuit Judge; DAUGHTREY and MOORE, Circuit Judges.

OPINION

BOYCE F. MARTIN, JR., Chief Circuit Judge. Years after Dow Corning Corporation filed a petition for reorganization under Chapter 11 of the Bankruptcy Code, and following extensive and vigorous negotiations, the third proposed plan of reorganization for Dow was submitted to the bankruptcy court. The bankruptcy court confirmed the

Amended Joint Plan of Reorganization for Dow and the district court affirmed the bankruptcy court's Confirmation Order. Certain claimants who voted against the Plan appealed. The first principal issue presented here is whether a bankruptcy court may enjoin a non-consenting creditor's claims against a non-debtor to facilitate a reorganization plan under Chapter 11 of the Bankruptcy Code. For the following reasons, we AFFIRM the district court's conclusion that, under certain circumstances, a bankruptcy court may enjoin a non-consenting creditor's claim against a non-debtor to facilitate a Chapter 11 plan of reorganization. However, the factual findings of the bankruptcy court do not demonstrate that such an injunction is appropriate in this case. Therefore, we REMAND to the district court. The second issue presented is whether the Plan's classification of foreign claimants complies with the Bankruptcy Code's classification requirements. For the following reasons we AFFIRM the bankruptcy court's determination regarding the Plan's classification.

I.

For nearly thirty years, Dow was the predominant producer of silicone gel breast implants, accounting for almost fifty percent of the entire market. In addition, Dow supplied silicone raw materials to other manufacturers of silicone gel breast implants.

In the 1980s, certain medical studies suggested that silicone gel may cause auto-immune tissue diseases such as lupus, Scleroderma and rheumatoid arthritis. In 1992, the Food and Drug Administration ordered that silicone gel implants be taken off the market and Dow ceased

manufacturing and marketing its silicone implants. Soon thereafter, tens of thousands of implant recipients sued Dow and its two shareholders, the Dow Chemical Company and Corning, Incorporated, claiming to have been injured by auto-immune reactions to the silicone in their implants. Other manufacturers and suppliers of silicone gel implants were named as co-defendants with Dow and its shareholders.

The Judicial Panel on Multidistrict Litigation consolidated the breast implant litigation for administration of pre-trial matters. See *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 793 F. Supp. 1098 (J.P.M.L. 1992). The consolidated litigation led to a proposed $ 4.225 billion global settlement, which the multidistrict litigation court approved in 1994. *See Lindsey v. Dow Corning Corp.* (In re Silicone Gel Breast Implant Prods. Liab. Litig.), 1994 U.S. Dist LEXIS 12521, No. CV 92- *P-10000-S, Civ. A. No. CV94-P-11558-S, 1994 WL 578353,* at *1 (N.D. Ala. Sept. 1, 1994). However, hundreds of thousands more women than anticipated filed claims with the global settlement fund and the settlement collapsed in 1995.

Later that year, Dow filed a petition for reorganization under Chapter 11 of the Bankruptcy Code. In order to reduce its exposure to claims, immediately after it filed for bankruptcy, Dow sought to transfer all of the breast implant actions, including actions against its shareholders, to the Eastern District of Michigan. Likewise, other breast implant manufacturers also requested that the cases against them be transferred to the Eastern District of Michigan. Because of Dow's bankruptcy, the court granted Dow's request as to the claims against Dow, but denied the transfer of the claims against Dow's shareholders and the other breast implant

manufacturers. *See In re Dow Corning Corp.*, 187 B.R. 919, 931-32 (E.D. Mich. 1995). We reversed the district court, holding that the district court had jurisdiction over Dow's shareholders and the other breast implant manufacturers, and remanded the requested transfers for analysis under abstention principles. *See In re Dow Corning*, 86 F.3d 482, 493-94 (6th Cir. 1996). On remand, the district court declined to exercise jurisdiction over Dow's shareholders and the other breast implant manufacturers based on its interpretation of abstention principles. , See *In re Dow Corning Corp. 1996 U.S. Dist LEXIS 16754*, No. 95- *CV-72397-DT, 1996 WL 511646*, at *3 (E.D. Mich. July 30, 1996). On a motion for a Writ of Mandamus, we reversed the district court's ruling with respect to Dow's shareholders. *See In re Dow Corning Corp.*, 113 F.3d 565, 571-572 (6th Cir. 1997). The district court then transferred all breast implant claims against Dow's shareholders to the Eastern District of Michigan.

The trustee in bankruptcy appointed several committees to represent the differing interests of Dow's claimants during the development of Dow's plan of reorganization. The Tort Claimants' Committee vigorously opposed Dow's first two proposed reorganization plans. Dow then entered into mediation with the committees, and on February 4, 1999, Dow and the Tort Claimants' Committee submitted the Amended Joint Plan of Reorganization to the bankruptcy court. On November 30, the bankruptcy court confirmed the Plan. In the following weeks, it issued seven separate opinions relating to its Confirmation Order.[1] The

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[1] *See In re Dow Corning Corp.* (Amended Opinion on the Classification and Treatment of Claims), 244 B.R. 634 (Bankr.

district court affirmed the bankruptcy court's Confirmation Order on November 13, 2000. *In re Dow Corning Corp*, 255 B.R. 445 (E.D. Mich. 2000). A timely appeal to this Court followed.

Because the bankruptcy court's opinions and the district court's opinion provide a detailed examination of the Plan, we discuss only the portions of the Plan that bear upon our decision.

Under the Plan, a $ 2.35 billion fund is established for the payment of claims asserted by (1) personal injury claimants, (2) government health care payers, and (3) other creditors asserting claims related to silicone-implant products liability claims. The $ 2.35 billion fund is established with funds contributed by Dow's products liability insurers, Dow's shareholders and Dow's operating cash reserves. As a *quid*

E.D. Mich. 1999); *In re Dow Corning Corp*. (Amended Opinion on Good Faith), 244 B.R. 673 (Bankr. E.D. Mich. 1999); *In re Dow Corning Corp*. (Amended Opinion on Cram Down of Class 4: Is it Fair and Equitable to Cram Down Commercial Claims with Interest Less than Contract Rate?), 244 B.R. 678 (Bankr. E.D. Mich. 1999); *In re Dow Corning Corp*. (Amended Opinion Regarding Cram Down on Class 18), 244 B.R. 696 (Bankr. E.D. Mich. 1999); *In re Dow Corning Corp*. (Amended Opinion Regarding Cram Down on Class 15), 244 B.R. 705 (Bankr. E.D. Mich. 1999); *In re Dow Corning Corp*. (Amended Opinion on 11 U.S.C. §§1129(a)(9) Objections of the I.R.S. and Texas Comptroller), *In re Dow Corning Corp*. 244 B.R. 718 (Bankr. E.D. Mich. 1999); and *In re Dow Corning Corp*. (Opinion on Best-Interests-of-Creditors Test, Feasibility, and Whether Plan Proponents Comply with the Applicable Provision of Title 11), 244 B.R. 721 (Bankr. E.D. Mich.1999).

pro quo for making proceeds available for the $ 2.35 billion fund, section 8.3 of the Plan releases Dow's insurers and shareholders from all further liability on claims arising out of settled personal injury claims, and section 8.4 permanently enjoins any party holding a claim released against Dow from bringing an action related to that claim against Dow's insurers or shareholders. *Plan* §§8.3, 8.4.

Under the Plan, claimants who choose to settle are channeled to the Settlement Facility, a legal entity created by the Plan and authorized to negotiate payments out of funds set aside for that purpose. Claimants who choose to litigate are channeled to the Litigation Facility, a legal entity created by the Plan that is essentially substituted for Dow as a defendant in the claimant's lawsuit.

The Plan divides claims and interests into thirty-three classes and subclasses. Classes 6.1 and 6.2 are composed of foreign breast-implant claimants who are given the opportunity to either settle or litigate their claims. Settlement payments to foreign breast implant claimants are between 35% and 60% of the amounts to be paid to domestic breast-implant claimants.

Class 15 is composed of all "Government Payer Claimants," namely, the United States and the governments of the Canadian provinces of Alberta and Manitoba. Class 15 voted against the Plan. The United States filed claims under the Medicare Secondary Payer Program, 42 U.S.C. §1395y(b)(2), and the Federal Medical Care Recovery Act, 42 U.S.C. §§2651-2653, which grant the United States the right to recover from insurers and other third parties, the cost of medical care that, though the legal responsibility of another

party, has been paid for or provided through a federal health benefit program.

Class 15 claims not resolved before the Plan's Confirmation Date are liquidated through the Litigation Facility. Canada Claimants recovering through either the Settlement Facility or the Litigation Facility are required to notify the claims administrator of any unresolved subrogation claims or liens held by the Canadian provinces. The claims administrator is under a duty to determine whether one of the Canadian provinces has a claim with respect to an impending Canada Claimant's payment, and to notify the province of its potential claim. The claims administrator must hold the claimant's payment in a trust until he receives instructions from the claimant and the Canadian province that they have reached an agreement as to the appropriate allocation of a settlement payment. If no agreement is reached, the dispute is referred to a court for resolution.

The United States's claims are not accorded similar protection. The Plan does not specifically permit the United States to interfere with payment to a claimant. Once a specific claimant has been paid, the United States's claims against Dow, and all other entities created by the Plan, are cut off for costs related to that claimant.

The bankruptcy court confirmed the Plan, but construed the non-debtor release and injunction provisions to apply only to consenting creditors. *In re Dow Corning Corp.*, 244 B.R at 745. Although the bankruptcy court determined that it has authority under the Bankruptcy Code to enjoin a non-consenting creditor's claims against non-debtors, it decided, based on non-bankruptcy law, that such injunctions

are inappropriate as applied to non-consenting creditors, and construed the Plan accordingly. *Id.* The district court affirmed the bankruptcy court's Confirmation Order but reversed the bankruptcy court's interpretation of the release and injunction provisions of the Plan. The district court interpreted the non-debtor release and injunction provisions of the Plan to apply to all creditors, consenting and non-consenting.

II.

In a bankruptcy proceeding, the bankruptcy court is the finder of fact. *In re Caldwell*, 851 F.2d 852, 857 (6th Cir. 1988). When a district court acts as an appellate court as it does in a bankruptcy proceeding, it reviews the bankruptcy court's factual findings under the clearly erroneous standard, and its conclusions of law *de novo*. *Id.* "In appeals from the decision of a district court on appeal from the bankruptcy court, the court of appeals independently reviews the bankruptcy court's decision, applying the clearly erroneous standard to findings of fact and *de novo* review to conclusions of law." *In re Madaj*, 149 F.3d 467, 468 (6th Cir. 1998) (quoting *In re Century Boat Co.*, 986 F.2d 154, 156 (6th Cir. 1993)). We review the district court's legal conclusions *de novo*. *In re Downs*, 103 F.3d 472, 477 (6th Cir. 1996).

The first issue we are asked to decide is whether a bankruptcy court has the authority to enjoin a non-consenting creditor's claims against a non-debtor to facilitate a reorganization plan under Chapter 11 of the Bankruptcy Code. This is a question of first impression in this Circuit.

The Bankruptcy Code does not explicitly prohibit or authorize a bankruptcy court to enjoin a non-consenting

creditor's claims against a non-debtor to facilitate a reorganization plan. *In re Continental Airlines*, 203 F.3d 203, 211 (3d Cir. 2000). However, bankruptcy courts, "as courts of equity, have broad authority to modify creditor-debtor relationships." *United States v. Energy Resources Co.*, 495 U.S. 545, 549, 109 L. Ed. 2d 580, 110 S. Ct. 2139 (1990). For example, section 105 (a) of the Bankruptcy Code grants a bankruptcy court the broad authority to issue "any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." *11 U.S.C. §105*(a). This section grants the bankruptcy court the power to take appropriate equitable measures needed to implement other sections of the Code. *See In re Granger Garage, Inc.*, 921 F.2d 74, 77 (6th Cir. 1990).

Consistent with section 105(a)'s broad grant of authority, the Code allows bankruptcy courts considerable discretion to approve plans of reorganization. *Energy Resources Co.*, 495 U.S. at 549. Section 1123(b)(6) permits a reorganization plan to "include any. . . appropriate provision not inconsistent with the applicable provisions of this title." 11 U.S.C. §1123(b)(6). Thus, the bankruptcy court, as a forum for resolving large and complex mass litigations, has substantial power to reorder creditor-debtor relations needed to achieve a successful reorganization. For example, under the doctrine of marshaling of assets, "the bankruptcy court has the power to order a creditor who has two funds to satisfy his debt to resort to the fund that will not defeat other creditors." *In re A.H. Robins Co.*, 880 F.2d 694, 701 (4th Cir. 1989). Moreover, it is an "ancient but very much alive doctrine . . . [that]. . . a creditor has no right to choose which of two funds will pay his claim." *Id.* Likewise, when a plan provides for the full payment of all claims,

enjoining claims against a non-debtor so as not to defeat reorganization is consistent with the bankruptcy court's primary function. *See id.* For the foregoing reasons, such an injunction is "not inconsistent" with the Code, and is authorized by section 1123(b)(6).

Nevertheless, some courts have found that the Bankruptcy Code does not permit enjoining a non-consenting creditor's claims against a non-debtor. *See In re Lowenschuss*, 67 F.3d 1394, 1401 (9th Cir. 1995); *In re Western Real Estate Fund, Inc.*, 922 F.2d 592, 600 (10th Cir. 1990). These courts primarily rely on section 524(e) of the Code, which provides that "the discharge of the debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. §524(e). However, this language explains the effect of a debtor's discharge. It does not prohibit the release of a non-debtor. *See In re Specialty Equip. Co.*, 3 F.3d 1043, 1047 (7th Cir. 1993) ("This language does not purport to limit or restrict the power of the bankruptcy court to otherwise grant a release to a third party."); *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1050 (5th Cir. 1987); *In re A.H. Robins Co.*, 880 F.2d at 702.

The bankruptcy court concluded that non-debtor releases were authorized by section 1123(b)(6), but were precluded by a non-bankruptcy law limitation on the bankruptcy court's equity power. *In re Dow Corning Corp.*, 244 B.R at 744. We disagree. The bankruptcy court cited *Grupo Mexicano de Desarrollo v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 322, 144 L. Ed. 2d 319, 119 S. Ct. 1961 (1999), for the proposition that a court's use of its general equity powers "is confined within the broad boundaries of traditional equitable relief." The *Grupo Mexicano* Court

explained that, "the equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act, 1789." *Id.* at 318 (quoting A. Dobie, Handbook of Federal Jurisdiction and Procedure 660 (1928)). Based upon this principle, the *Grupo Mexicano* Court vacated an injunction preventing a toll road operator from dissipating, transferring, or encumbering its only assets to the prejudice of an unsecured note holder because traditional equity jurisprudence did not allow such remedies until a debt had been established. *Id. at 319.* The bankruptcy court, applying the *Grupo Mexicano* analysis, concluded that non-consensual, non-debtor releases were also unprecedented in traditional equity jurisprudence, and therefore exceeded the bankruptcy court's equitable powers. *In re Dow Corning Corp.*, 244 B.R. at 744.

The district court rejected this argument on the grounds that the releases were authorized by "sufficient statutory authority under the Bankruptcy Code." *In re Dow Corning Corp.*, 255 B.R. at 480. For the following reasons, we agree with the district court. In *Grupo Mexicano*, the Supreme Court distinguished its own holding from that in *United States v. First National City Bank*, 379 U.S. 378, 13 L. Ed. 2d 365, 85 S. Ct. 528 (1965). 527 U.S. at 326. *First National* approved an injunction preventing a third-party bank from transferring any of a taxpayer's assets. 379 U.S at 379-380. The *Grupo Mexicano* Court distinguished that holding on the grounds that the *First National* case "involved not the Court's general equitable powers under the Judiciary Act of 1789, but its powers under the statute authorizing tax injunctions." *Grupo Mexicano*, 527 U.S. at 326. Thus, because the district court had a statutory basis for issuing such

an injunction, it was not confined to traditional equity jurisprudence available at the enactment of the Judiciary Act of 1789. The statute in *First National* gave courts the power to grant injunctions "necessary or appropriate for the enforcement of the internal revenue laws." 26 U.S.C. §7402(a) (1964). Similarly, the Bankruptcy Code gives bankruptcy courts the power to grant injunctions "necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. §105(a). We conclude that due to this statutory grant of power, the bankruptcy court is not confined to traditional equity jurisprudence and therefore, the bankruptcy court's *Grupo Mexicano* analysis was misplaced.

Because we determine that enjoining a non-consenting creditor's claim against a non-debtor is "not inconsistent" with the Code and that *Grupo Mexicano* does not preclude such an injunction, we turn to when such an injunction is an "appropriate provision" of a reorganization plan pursuant to section 1123(b)(6). Because such an injunction is a dramatic measure to be used cautiously, we follow those circuits that have held that enjoining a non-consenting creditor's claim is only appropriate in "unusual circumstances." *See In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 293 (2nd Cir. 1992); *In Re A.H. Robins Co.*, 880 F.2d at 702; *MacArthur v. Johns-Manville, Corp.*, 837 F.2d 89, 93-94 (2nd Cir. 1988). In determining whether there are "unusual circumstances," our sister circuits have considered a number of factors, which are summarized in our holding below. We hold that when the following seven factors are present, the bankruptcy court may enjoin a non-consenting creditor's claims against a non-debtor: (1) There is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor

is, in essence, a suit against the debtor or will deplete the assets of the estate; (2) The non-debtor has contributed substantial assets to the reorganization; (3) The injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor; (4) The impacted class, or classes, has overwhelmingly voted to accept the plan; (5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction; 6) The plan provides an opportunity for those claimants who choose not to settle to recover in full and; (7) The bankruptcy court made a record of specific factual findings that support its conclusions. *See In re A.H. Robins*, 880 F.2d at 701-702; *Johns-Manville*, 837 F.2d at 92-94; *In re Continental Airlines*, 203 F.3d at 214.

For several reasons, the record produced by the bankruptcy court in this case does not support a finding of "unusual circumstances" such that we can endorse enjoining non-consenting creditors' claims against a non-debtor. The bankruptcy court's findings of fact with regards to the "unusual circumstances" test were no more than conclusory statements that restated elements of the test in the form of factual conclusions. The bankruptcy court provided no explanation or discussion of the evidence underlying these findings. Moreover, the findings did not discuss the facts as they related specifically to the various released parties, but merely made sweeping statements as to all released parties collectively. Such factual determinations are not sufficiently specific and explained to support a finding of "unusual circumstances." And, when "the bankruptcy court's factual findings are silent or ambiguous as to. . . outcome

determinative factual questions, . . . [we] must remand the case to the bankruptcy court for the necessary factual determinations." *In re Caldwell*, 851 F.2d at 857.

First, the bankruptcy court's factual determination that the release and injunction provisions of the Plan are "essential" to the reorganization is ambiguous. In its November 30, 1999 Findings of Fact and Conclusions of Law, the bankruptcy court concluded that the release and injunction provisions were "essential to the reorganization pursuant to the Plan." However, the bankruptcy court subsequently interpreted the release and injunction provisions to apply only to consenting creditors, implying that enjoining non-consenting creditors is not essential to the reorganization. It explained that it found the provisions "essential" in order to "obviate the need for remand in the event [the bankruptcy court is] reversed on appeal with regard to the scope and permissibility of the release and injunction provisions." *In re Dow Corning Corp.*, 244 B.R. at 747. These are inconsistent fact findings that the bankruptcy court must clarify in order for us to endorse enjoining claims against non-debtors.

Second, the bankruptcy court did not make sufficiently particularized factual findings that the Settling Insurers, Corning, Incorporated, the Dow Chemical Company, and Dow's affiliates will make significant contributions to the reorganization pursuant to the Plan. The bankruptcy court declared the contributions important without explaining how or why it reached this conclusion. To satisfy the "unusual circumstances" test, the bankruptcy court must specify facts that support a conclusion that the released parties will make significant contributions to the reorganization pursuant to the Plan.

Third, in order for the Plan to be approved under the "unusual circumstances" test, it must ensure an opportunity for those claimants who choose not to settle to recover in full, and this determination must be supported by particularized factual findings. The bankruptcy court determined that Class 15 claimants, composed of the United States and the Canadian provinces of Alberta and Manitoba, "who obtain judgments against the Litigation Facility will be paid in full." *In re Dow Corning Corp.*, 244 B.R. at 712. We find the determination that Class 15 claimants will be paid in full to be clearly erroneous with regards to the United States.

As an independent matter, the bankruptcy court had to determine whether Class 15 claimants were paid in full because the "cram down" provision of the Code required such a finding. 11 U.S.C. §1129(b)(2)(B). The "cram down" provision details special protections to classes of creditors who, like the Class 15 claimants, vote against approval of a reorganization plan. Under the "cram down" provision, if an objecting, unsecured creditor's claims are not paid in full, junior claimants cannot receive or retain property on account of their prior interest in the debtor. *Id.* Dow's shareholders' equity interests are junior to the United States's and the Canadian governmental health care payers' unsecured claims for medical expenses, and, under the Plan, the shareholders maintain their full equity interest in the reorganized debtor. Thus, to decide whether the Plan complied with the "cram down" provision of the Code, the bankruptcy court had to decide whether the Class 15 claimants would be fully paid. The bankruptcy court determined that the full payment requirement was met for all Class 15 members. Because the Plan does not provide the United States adequate protection to

meet the full payment requirement, we find this determination clearly erroneous.

In addition, section 1123(a)(4) requires that claims of creditors that are members of the same class be treated equally. 11 U.S.C. §1123(a)(4). Under the Plan, the Canadian governmental payers are accorded far more effective recovery rights than the United States. This disparate treatment of members of the same class violates section 1123(a)(4)'s equal treatment requirement.

The Canadian governmental payers are adequately protected under the Plan. They are protected because the Plan incorporates the British Columbia Class Action Settlement Agreement, which requires that there be some joint resolution of both the beneficiary's claim and the related Canadian governmental claim before an individual beneficiary of a governmental health care program is paid. *Plan* §§1.15, 1.16, 1.131, 5.7.1. Under the Settlement Agreement, the British Columbia claims administrator must determine whether a Canadian governmental payer has a claim with respect to an impending beneficiary's payment and notify the Canadian payer promptly of its potential claim. The claims administrator must then hold the beneficiary's payment in trust until he receives instructions from both the individual beneficiary and the government party that they have reached an agreement as to the appropriate allocation of a settlement payment. *British Columbia Class Action Settlement Agreement* §6.3. If no agreement is reached, the dispute is referred to the court for resolution. The court then adjudicates an appropriate allocation of both claims, and issues instructions to the administrator for an appropriate disbursement to both parties. *Id.*

In contrast, no such protections are provided to the United States. The Plan provides no practical mechanism by which the United States can prevent payment to a beneficiary. To the contrary, the Plan expressly states that the United States has no right to stop, delay, or interfere with payment to a beneficiary. *Plan* §1.131; *Settlement Facility Agreement* §7.02(f). Furthermore, once a specific claimant has been paid, the United States's claims against Dow, and all other entities created by the Plan, are cut off for costs related to that claimant. *Litigation Facility Agreement* §6.07(a); *Plan* §6.8. Moreover, the Plan fails to specify the amount of notice that the United States must receive before payment is made to a health care beneficiary.

Despite the Plan's lack of any adequate procedural protections for the United States, the bankruptcy court and the district court, nonetheless, determined that the United States claims would be paid in full. The district court relied on two legal remedies that it deemed available. First, it determined that the United States may seek an injunction barring disbursements to an individual claimant. The Plan allows Class 15 claimants to seek injunctive or equitable relief "to the extent such relief is available under applicable law." *Plan* §6.8(b). This is an illusory protection. The United States has no express statutory right to prohibit a third party from paying whomever it chooses, and the Plan does not confer any new affirmative right to injunctive relief. By merely recognizing that such injunctive relief is available to the extent it is already permitted under existing law, the Plan leaves the United States with a highly uncertain and contingent mechanism to protect its interests. Second, the district court determined that the United States could sue a beneficiary after he or she receives payment. This protection is also inadequate

to ensure full payment. The United States has no express statutory right under the Federal Medical Care Recovery Act to recover from a beneficiary who receives payment from a third party. 42 U.S.C. §§2651-2653. And, even where the United States has a legal right to recover from an individual beneficiary, there is no assurance of full repayment of the health care expenditures.

In order to ensure full payment the Plan must delineate procedural mechanisms for protecting the United States's claims. The full payment requirement of the "unusual circumstances" test and the Code's "cram down" provision would be met if the revised Plan (1) provides an adequate mechanism by which the United States can prevent the claims administrator from paying contested claims, such as providing the United States with the same kind of automatic suspension of payment to government beneficiaries that is afforded to the Canadian governmental payers under the British Columbia Class Action Settlement Agreement, and (2) specifies the amount and form of notice that must be given to the United States prior to the payment of contested claims by the claims administrator. In addition, such protections would provide the United States with recovery rights sufficiently similar to the Canadian governmental payers to ensure equal treatment of Class 15 claimants as required by section 1123(a)(4).

III.

The next issue we are asked to decide is whether the Plan's classification of foreign claimants meets the Bankruptcy Code's classification requirements. For the following reasons we hold that the Plan's classification of foreign claimants meets the Code's requirements.

Under the Plan, a foreign claimant is defined as someone who (1) is not a United States citizen, (2) is not a resident alien, or (3) did not have his or her medical procedure performed in the United States. *Plan* §1.67. The Plan creates two classes for foreign claimants. Class 6.1 consists of claimants who are from a country that either (1) belongs to the European Union, (2) has a common law tort system, or (3) has a per capita Gross Domestic Product of greater than 60% of the United States's per capita Gross Domestic Product. Class 6.2 consists of claimants from all other countries. Class 5 generally consists of domestic breast-implant claimants. Class 6.1 claimants receive settlement offers of 60% of analogous domestic claimants' settlements, and Class 6.2 receive settlements of 35% of the domestic claimants' settlements. Members of both classes retain the option to litigate against the Litigation Facility for the full value of the claim should they deem the settlement offer inadequate.

The various groups of foreign claimants argue that their claims are not worth less than those of the domestic tort claimants and, therefore, should not be classified separately from domestic claims. The issue is whether the Plan improperly classifies the foreign claimants separately from domestic claimants. For the following reasons we hold that the separate classification is not improper.

The Bankruptcy Code provides that "a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class." 11 U.S.C. §1122(a). This circuit has recognized that section 1122(a), "by its express language, only addresses the problem of dissimilar claims being

included in the same class." *In re U.S. Trucking*, 800 F.2d 581, 585 (6th Cir. 1986). Section 1122(a) does not demand that all similar claims be in the same class. *Id.* To the contrary, the bankruptcy court has substantial discretion to place similar claims in different classes. *Id.* We have observed that "Congress incorporated into section 1122 . . . . broad discretion to determine proper classification according to the factual circumstances of each individual case." *Id.* at 586.

In this case, the bankruptcy court determined that the evidence supported the factual assumptions upon which the classifications are based, and that given those facts, the Plan's classifications are proper. For example, the bankruptcy court found the testimony of three widely recognized expert witnesses helpful. These three expert witnesses had served on the panel for developing the classification scheme used in , *Bowling v. Pfizer, Inc.* (S.D. Ohio 1995). *Pfizer's* classification scheme was the model used to develop the scheme in this case. *Id.* These expert witnesses explained the *Pfizer* methodology and its relevance to the current case. They offered quantitative evidence demonstrating that the highest tort awards in various other countries were significantly lower than in the United States. For example, one expert witness testified that the highest non-pecuniary award in injury cases in Australia is approximately $ 230,000. The bankruptcy court found these witnesses credible, in contrast to the foreign claimants' witnesses, who the court found to be "unhelpful." *In re Dow Corning Corp*. 244 B.R. at 660. Based on such evidence, the bankruptcy court found that "without question, the evidence on the record shows that tort recoveries in the United States tend to be significantly higher than those in foreign jurisdictions." *Id.* at 661. Though

the foreign claimants point to countervailing considerations, their arguments, at best, show that there was conflicting evidence on the factual assumptions underlying the classification scheme. The foreign claimants have not shown that the facts used to support the separate classifications for foreign and domestic claimants were clearly erroneous.

Second, the various groups of foreign claimants contend that their claims are more valuable than claims originating from other countries in their respective classes. They argue that the various claims in their class are not "substantially similar" as required by section 1122(a). They further argue that by giving identical consideration to class members whose claims are of different value, they are not being treated the same as other members of their class in violation of the Code's requirement that claimants within a class be treated equally. 11 U.S.C §1123(a)(4). This issue, therefore, turns on whether the Plan improperly places foreign claims that are not "substantially similar" in the same class. For the following reasons we find that the bankruptcy court's determination that the claims within a given class are "substantially similar" is not clearly erroneous.

The bankruptcy court relied on the testimony of a leading expert in comparative law methodology, Basil Markenisis, who pointed to legal, economic, and cultural factors supporting the bankruptcy court's conclusion that the claims within each class are "substantially similar." Markenisis discussed (1) the availability of social safety nets in other countries, (2) other countries' reliance on judges as opposed to juries, (3) limitations on punitive damages, (4) unavailability of contingency fees, (5) limitations on strict liability doctrines, (6) cultural factors, (7) reluctance to use

lawyers, especially in the Far East, and (8) reliance upon semi-official medical reports in Europe. The bankruptcy court concluded, based on such evidence, that the claims are "substantially similar." Though the foreign claimants offer countervailing considerations, they have offered no evidence to indicate that the facts relied upon by the bankruptcy court were clearly erroneous. Moreover, we note that all foreign claimants retain the right to pursue full payment of their claims in the Litigation Facility. The fact that foreign claimants maintain the litigation option further supports the finding that the Plan does not treat claims that are in the same class unequally.

IV.

For the reasons set forth above, we AFFIRM the bankruptcy court's determination that the Plan's classification of foreign claimants meets the Bankruptcy Code's requirements. In addition, we AFFIRM the district court's determination that, when there are "unusual circumstances," the bankruptcy court may enjoin non-consenting creditors' claims against a non-debtor to facilitate a Chapter 11 plan of reorganization. However, we REMAND this case to the district court for those matters needing additional findings.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 00-2516/2517/2518/2520/2521/2522/2523/2524/2525
01-1001/1102/1349

[Filed January 29, 2002]

In re: DOW CORNING CORPORATION, Debtor.	)
CLASS FIVE NEVADA CLAIMANTS (00-2516); JANET S. LACY, individually and on behalf of her minor child, Andrea Lane Atherton; JAMA NMI RUSSANO, individually and as guardian for Richard Todd Russano; MICHAEL NMI RUSSANO; ANDREA LANE ATHERTON, Claimant, a minor; RICHARD TODD RUSSANO, a minor (00-2517); 1,300 AUSTRALIAN TORT CLAIMANTS (00-2518); MARTHA S. JACOBS (00-2520); HELEN D. SCHROEDER (00-2521); BEATRIX SHISHIDO (00-2522); PENNSYLVANIA COORDINATED SILICONE BREAST IMPLANT LITIGATION (00-2523); KAREN L. HUSTEAD (00-2524);	)

CERTAIN FOREIGN CLAIMANTS (00-2525); HARTFORD ACCIDENT AND INDEMNITY COMPANY; HARTFORD FIRE INSURANCE COMPANY; NUTMEG INSURANCE COMPANY; FIRST STATE UNDERWRITERS AGENCY OF NEW ENGLAND REINSURANCE CORPORATION; TWIN CITY FIRE INSURANCE COMPANY; EXCESS INSURANCE COMPANY; FIRST STATE INSURANCE COMPANY (01-1001); UNITED STATES OF AMERICA (01- 1102); NEW ZEALAND CLAIMANTS (0l- 1349),

Plaintiffs-Appellants,

v.

DOW CORNING CORPORATION, Debtor; OFFICIAL COMMITTEE OF TORT CLAIMANTS; THE DOW CHEMICAL COMPANY; CORNING, INCORPORATED, OFFICIAL COMMITTEE OF PHYSICIAN CREDITORS; HARTFORD ACCIDENT AND INDEMNITY COMPANY; HARTFORD FIRE INSURANCE COMPANY; NUTMEG INSURANCE COMPANY; FIRST STATE UNDERWRITERS AGENCY OF NEW ENGLAND REINSURANCE CORPORATION; TWIN CITY FIRE INSURANCE COMPANY; EXCESS INSURANCE

COMPANY; FIRST STATE)
INSURANCE COMPANY; CERTAIN)
LLOYDS OF LONDON)
UNDERWRITERS; CERTAIN LONDON)
MARKET INSURANCE COMPANIES,)
Defendants -Appellees.)
_____)

Before: MARTIN, Chief Circuit Judge; DAUGHTREY and MOORE, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED IN PART and the case is REMANDED to the district court for those matters needing additional findings in accordance with the opinion of this court.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No: 00-2516: 00-2518:00-2520: 00-2521: 00-2522: 002523: 00-2524: 00-2525: 01-1001: 01-1349

[Filed February 20, 2002]

In re: Dow Corning Corporation	)
Debtor	)
----------	)
Class Five Nevada Claimants	)
Appellants	)
v.	)
	)
Dow Corning Corporation;	)
Dow Chemical Company;	)
Corning Incorporated;	)
Official Committee of Physician	)
Creditors,	)
Appellees	)
	)

MANDATE

Pursuant to the court's disposition that was filed 1/29/02 the mandate for this case hereby issues today.

COSTS: NONE

Attest:
/s/_____
Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case Nos:00-2516: 00-2517: 00-2518: 00-2520: 00-2521: 00-2522: 00-2523: 00-2524: 00-2525: 01-1001: 01-1102: 01-1349

[Filed May 2, 2001]

In re: DOW CORNING CORPORATION, Debtor.	)
CLASS FIVE NEVADA CLAIMANTS (00-2516); JANET S. LACY, et al (00-2517); 1,300 AUSTRALIAN TORT CLAIMANTS (00-2518); MARTI S. JACOBS (00-2520); HELEN D. SCHROEDER (00-2521); BEATRIX SHISHIDO (00-2522); PENNSYLVANIA COORDINATED SILICONE BREAST IMPLANT LITIGATION (00-2523); KAREN L. HUSTEAD (00-2524); CERTAIN FOREIGN CLAIMANTS (00-2525); HARTFORD ACCIDENT AND INDEMNITY COMPANY; HARTFORD FIRE INSURANCE COMPANY; NUTMEG INSURANCE COMPANY; FIRST STATE UNDERWRITERS AGENCY OF	)

NEW ENGLAND REINSURANCE CORPORATION; TWIN CITY FIRE INSURANCE COMPANY; EXCESS INSURANCE COMPANY; FIRST STATE INSURANCE COMPANY (01-1001); UNITED STATES OF AMERICA (01 - 1102); NEW ZEALAND CLAIMANTS (0 l- 1349),

Appellants,

v.

DOW CORNING CORPORATION; THE DOW CHEMICAL COMPANY; OFFICIAL COMMITTEE OF TORT CLAIMANTS; CERTAIN LLOYDS OF LONDON UNDERWRITERS; CERTAIN LONDON MARKET INSURANCE COMPANIES; OFFICIAL COMMITTEE OF PHYSICIAN CREDITORS

Appellees.

The court having determined that consolidation of the above causes for purposes of briefing and submission is appropriate,

It is ORDERED that the causes be and they hereby are consolidated for the purposes stated above.

It is further **ORDERED** that the causes shall be set for oral argument at the earliest practicable date.

ENTERED PURSUANT TO RULE 45(a), RULES OF THE SIXTH CIRCUIT.
Leonard Green, Clerk

/s/_____

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case Nos. 99-CV-75924-DT, 99-CV-75925-DT, 99-CV-75958-DT, 99-CV-75960-DT, 99-CV-76214-DT, 99-CV-76215-DT, 00-CV-70029-DT

[Filed February 5, 2001]

IN RE:	)
	)
DOW CORNING CORPORATION	)
	)
Debtor.	)
	)

BEFORE
DENISE PAGE HOOD, United State District Judge

OPINION DENYING MOTION FOR RECONSIDERATION

The Court previously entered an Opinion dated November 13, 2000 in the above-captioned matters confirming the Amended Joint Plan of Reorganization proposed by the Debtor Dow Corning Corporation and the Official Committee of Tort Claimants and affirming in part and reversing in part the Bankruptcy Court's opinions related

to its Confirmation Order.[1] The Class Five Nevada Claimants timely filed a Motion for Reconsideration of the Court's November 13, 2000 Opinion.[2] The Lacy Appellants, Helene D. Schroeder, and Marti Jacobs joined in the Class Five Nevada Claimants' Motion for Reconsideration.[3]

The Local Rules of the Eastern District of Michigan provide that any motion for reconsideration shall be served not later than 10 days after entry of such order. No response to the motion and no oral argument thereon shall be allowed unless the Court, after filing of the motion, otherwise directs. The Local Rule further states:

> (3) **Grounds.** Generally, and without restricting the discretion of the Court, motions for rehearing or reconsideration which merely

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[1] The Court has issued an Amended Opinion Relating to Appeals From and Motions Regarding the Bankruptcy Court's November 30, 1999 Confirmation Order to correct typographical errors only.

[2] The Class Five Nevada Claimants also filed a Motion to Stay the Case pending the Court's ruling on the Motion for Reconsideration which was withdrawn by the Class Five Nevada Claimants pursuant to an agreement entered into by the parties. (Docket No. 33, filed December 6, 2000)

[3] The Court notes that these motions were filed beyond the ten days required under E.D. Mich. LR 7.1(g). The Lacy Appellants' memorandum was filed on December 14, 2000 (Case No. 99-CV-75925-DT, Docket No. 25). Helene Schroeder's Motion was filed on December 6, 2000 (Case No. 99-CV-75958-DT, Docket No. 21). Marti Jacobs' Motion was filed on December 7, 2000 (Case No. 99-CV-75960-DT, Docket No. 32).

> present the same issues ruled upon by the Court, either expressly or by reasonable implication, shall not be granted. The movant shall not only demonstrate a palpable defect by which the Court and the parties have been misled but also show that a different disposition of the case must result from a correction thereof.
>
> E.D. Mich. LR 7.1(g)(3).

The Court finds that the motion presents the same issues ruled upon by the Court, either directly or by implication. Although some of the language used in the November 13, 2000 Opinion could be construed to suggest that the individual Shareholders, Dow Chemical Co. and Corning, Inc., could be *named defendants* should a claimant choose not to enter into the Settlement Facility, this Court's Opinion clearly indicated that "the Plan provides for *claims* against the Debtor and the non-debtors to be channeled to the Litigation Facility if the claimants choose not to enter into the Settlement Facility. The release and injunction provisions do not apply to claimants who choose to bring their *claims* against the Debtor and the non-debtors via the Litigation Facility." *Opinion Relating to Appeals From and Motions Regarding the Bankruptcy Court's November 30, 1999 Confirmation Order*, p. 46 (November 13, 1999)(emphasis added).

The Court and the parties were on notice and were aware of the express language in the various documents under the Plan and the Case Management Order that the named defendant would be the Litigation Facility should the

claimants choose to pursue their claims against the Debtor and/or its Shareholders (other than through the Settlement Facility). The Amended Joint Disclosure Statement states, "claims channeled to the Litigation Facility shall be asserted solely against the Litigation Facility." (Amended Joint Disclosure Statement, p. 85) The Litigation Facility Agreement states that the Litigation Facility "assumes and shall be directly and exclusively liable for any and all liabilities, ..., of the Debtor Affiliated Parties ..." (Litigation Facility Agreement, P 2.03(a)) The Case Management Order indicates, "the [Litigation] Facility is the defendant in place of Dow Corning and the Shareholders." *Case Management Order*, P 6(a). The Court notes that all these documents were provided to the Claimants who had ample opportunity to review the documents. This Court allowed the parties to comment on the Case Management Order. There were no specific arguments brought before this Court nor the Bankruptcy Court regarding the language that the Litigation Facility would be the named defendant in place of Dow Corning or its Shareholders. The Plan documents clearly provide that the Claimants would have the opportunity to litigate their *claims* against Dow Corning and its Shareholders. The *claims* against Dow Corning and its Shareholders remain viable in the Litigation Facility.

As the Bankruptcy Court found, and as affirmed by this Court, the evidence was overwhelming that the funding of the Litigation Facility is more than sufficient to pay all personal injury claims, resolved through litigation, in full. *Opinion Relating to Appeals From and Motions Regarding the Bankruptcy Court's November 30, 1999 Confirmation Order*, pp. 83-85 (November 13, 1999)(emphasis added).

The Class Five Nevada Claimants have failed to demonstrate a palpable defect by which the Court and the parties have been misled. The Class Five Nevada Claimants have also failed to show that a different disposition of the case would result if the Court were to rule in their favor. The Motion for Reconsideration is DENIED.

DENISE PAGE HOOD
United States District Judge

DATED: FEB 05 2001

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
814 THEODORE LEVIN
UNITED STATES COURTHOUSE
231 W. LAFAYETTE BOULEVARD
DETROIT, MICHIGAN 48226

RE: In re Dow Corning Corporation, Debtor

On February 5, 2001, the Honorable Denise Page Hood entered an Amended Opinion Relating to Appeals From and Motions Regarding the Bankruptcy Court's November 30, 1999 Confirmation Order. No substantive changes were made, other than to correct typographical errors and errors to legal citations.

Judge Hood also entered an Order Denying Motions for Reconsideration filed by various parties.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed February 5, 2001]

HON. DENISE PAGE HOOD

Case Nos. 99-CV-73941-DT
99-CV-74218-DT
99-CV-75380-DT
99-CV-75799-DT
99-CV-75922-DT
99-CV-75923-DT
99-CV-75924-DT
99-CV-75925-DT
99-CV-75927-DT
99-CV-75929-DT
99-CV-75930-DT
99-CV-75958-DT
99-CV-75959-DT
99-CV-75960-DT
99-CV-76007-DT
99-CV-76008-DT
99-CV-76009-DT
99-CV-76063-DT
99-CV-76214-DT
99-CV-76215-DT
00-CV-70029-DT
00-CV-70076-DT
00-CV-70176-DT
00-CV-70177-DT
00-CV-70178-DT
00-CV-70179-DT
00-CV-70337-DT

00-CV-70338-DT

In Re:	)
DOW CORNING CORPORATION,	)
Debtor.	)
	)

AMENDED OPINION RELATING TO APPEALS FROM AND MOTIONS REGARDING THE BANKRUPTCY COURT'S NOVEMBER 30, 1999 CONFIRMATION ORDER

I. INTRODUCTION

On May 15, 1995, the Debtor Dow Corning Corporation ("Dow Corning" or "the Debtor") filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtor submitted two plans of reorganization before negotiating with various parties, including the Official Committee of Tort Claimants (the "Tort Claimants' Committee"). On November 8, 1998, the Debtor and the Tort Claimants' Committee (the "Proponents") submitted a Joint Plan of Reorganization, amended on February 4, 1999. The Bankruptcy Court held hearings on the confirmation of the Amended Joint Plan over the course of several weeks, commencing on June 28, 1999, with closing arguments heard on July 30, 1999. Testimonies were taken and evidence submitted during the hearings. Numerous briefs and documents were filed by many parties in support of or in opposition to the confirmation of the Amended Joint Plan, including post-hearing briefs.

The Bankruptcy Court entered its Findings of Fact and Conclusions of Law and Order Confirming the Amended Joint

Plan on November 30, 1999. The Bankruptcy Court also entered various opinions on this date. The Bankruptcy Court indicated that subsequent opinions would be entered in the future, and on December 21, 1999, the Bankruptcy Court entered an opinion on the release and injunction issue, the best-interests-of creditors test, feasibility and whether the Plan complies with other provisions of the Bankruptcy Code. In all, seven separate opinions were entered relative to the November 30, 1999 Confirmation Order.[1] Not all of the parties or all of the issues in the opinions were appealed. The Court will address the opinions appealed from below.

The following parties filed appeals and/or motions relating to the Confirmation Order which are currently before

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[1] The following are the opinions entered by the Bankruptcy Court relating to the Confirmation Order: *In re Dow Corning Corp. (Amended Opinion on the Classification and Treatment of Claims)*, 244 B.R. 634 (Bankr. E.D. Mich. 1999); *In re Dow Corning Corp. (Amended Opinion on Good Faith)*, 244 B.R. 673 (Bankr. E.D. Mich. 1999); *In re Dow Corning Corp. (Amended Opinion on Cram Down of Class 4: Is it Fair and Equitable to Cram Down Commercial Claims with Interest Less than Contract Rate?)*, 244 B.R. 678 (Bankr. E.D. Mich. 1999); *In re Dow Corning Corp. (Amended Opinion Regarding Cram Down on Class 18)*, 244 B.R. 696 (Bankr. E.D. Mich. 1999);*In re Dow Corning Corp. (Amended Opinion Regarding Cram Down on Class 15)*, 244 B.R. 705 (Bankr. E.D. Mich. 1999); *In re Dow Corning Corp. (Amended Opinion on 11 U.S.C. § 1129(a)(9) Objections of the I.R.S. and Texas Comptroller)*, 244 B.R. 718 (Bankr. E.D. Mich. 1999); and *In re Dow Corning Corp. (Opinion on Best-Interests-of-Creditors Test, Feasibility, and Whether Plan Proponents comply with the Applicable Provision of Title 11)*, 244 B.R. 721 (Bankr. E.D. Mich. 1999).

the Court:[2]

Case No.	Date filed with Bankruptcy Court	Appellant/Movant
99-CV-73941	08/09/99	Certain Foreign Claimants
99-CV-74218	08/25/99	Korean Claimants
99-CV-75380	11/05/99	United States of America
99-CV-75799	12/01/99	United States of America
99-CV-75922	12/09/99	Physician Claimants
99-CV-75923	12/08/99	New Zealand Claimants
99-CV-75924	12/09/99	Class Five Nevada Claimants
99-CV-75925	12/09/99	Class Five Texas Children Claimants represented by the Lacy firm
99-CV-75927	12/09/99	Australian Claimants
99-CV-75929	12/10/99	Certain Foreign Claimants represented by the Shainwald firm

[2] The following appeals were voluntarily dismissed prior to the issuance of this opinion: 99-CV-73574-DT, Debtor Acquisition Co., Appellant; 99-CV-73657-DT, Halcyon, et al, Appellants; 99-CV-73658-DT, Angelo Gordon Co., et al., Appellants; 99-CV-73659-DT, Davidson Kempner, et al., Appellants; and 99-CV-76010-DT, Linda Saenz, *pro se*, Appellant.

99-CV-75930	12/08/99	Official Committee of Physician Creditors
99-CV-75958	12/10/99	Helene D. Schroeder, *pro se*
99-CV-75959	12/10/99	Sue Olexa, *pro se*
99-CV-75960	12/10/99	Marti Jacobs, *pro se*
99-CV-76007	12/13/99	Beatrix Shishido, *pro se*
99-CV-76008	12/13/99	Karen L. Hustead
99-CV-76009	12/13/99	Pamela Dowd, *pro se* and Maribeth West, *pro se*
99-CV-76063	12/16/99	Class Five Pennsylvania Claimants, Pennsylvania Coordinated Silicone Breast Implant Litigation
99-CV-76214	12/29/99	Dow Chemical
99-CV-76215	12/29/99	Corning, Inc.
00-CV-70029	12/30/99	Dow Corning and Official Committee of Tort Claimants
00-CV-70076	12/30/99	Rita Altig, et al.
00-CV-70176	01/10/00	Hartford Accident & Indemnity Co., et al.
00-CV-70177	01/10/00	Lloyds of London, et al.
00-CV-70178	01/10/00	Korean Claimants
00-CV-70179	01/06/00	Dow Corning and Official Committee of Tort Claimants' Motion to Withdraw the Reference
00-CV-70337	01/19/00	Dow Chemical
00-CV-70338	01/19/00	Corning, Inc.

The general issues on appeal include: the classification and treatment of claims; the injunction and release; the cap on punitive damages; whether the proposed plan is fair; and the

United States' motion to compel. This Court entered an order consolidating the briefing schedule of all the appeals relating to the Confirmation Order entered by the Bankruptcy Court. On April 12 and 13, 2000, the Court held hearings on the appeals, allowing counsel representing the appellants and appellees, *pro se* individuals and other interested parties to present arguments. Some parties filed supplemental briefs after the hearings. For the reasons set forth below, the Court AFFIRMS the Bankruptcy Court's November 30, 1999 Confirmation Order and REVERSES in part its December 21, 1999 Opinion on the Injunction and Release issue as it relates to the November 30, 1999 Order.

II. BACKGROUND

In 1943, The Dow Chemical Company ("Dow Chemical") and Corning Glass Works (now Corning, Incorporated ("Corning, Inc.")), formed Dow Corning Corporation for the purpose of developing and producing products based on silicone chemistry. Today, Dow Holdings, Inc. (a wholly-owned subsidiary of Dow Chemical) and Corning, Inc. are the sole shareholders of the Debtor, each owning 50% of the Debtor's common stock. *See, generally, In re Dow Corning Corp.*, 187 B.R. 919 (E.D. Mich. 1995), *rev'd in part*, 103 F.3d 129 (6th Cir. 1996) and *In re Dow Corning Corp.*, 211 B.R. 545, 550 (Bankr. E.D. Mich. 1997).

The Debtor and its subsidiaries produce thousands of silicone-based products both for nonmedical and medical uses. In the early 1960s, Drs. Thomas Cronin and Frank Gerow, plastic surgeons, developed the idea of placing silicone gel inside a sealed packet which would be surgically implanted

inside a woman's breasts and collaborated with the Debtor to create what is now known as a silicone gel breast implant. *In re Dow Corning Corp.*, 211 B.R. at 550. The Debtor introduced silicone gel breast implants to the market in 1964. *Id.* There were problems with the breast implants, including leakage and rupture. *Id.* As a result of various complaints, inserts were placed in the packages warning recipients of the potential non-pathogenic side effects. *Id.* at 551. The Debtor did not face significant legal actions during this time period because of the warnings in the packets. *Id.*

Reports in the 1980s suggested that silicone gel may cause systemic disease in humans. *Id.* Women began filing lawsuits during this period alleging that silicone gel caused an auto-immune connective tissue disease such as lupus, Scleroderma or rheumatoid arthritis. *Id.* Later on, suits were filed alleging symptoms such as aches and pains, fatigue, insomnia, memory loss and headaches. *Id.* After a successful suit against the Debtor in 1984, the Debtor modified its package inserts acknowledging that there were "reports of suspected immunological responses to silicone mammary implants" and that "convincing evidence does not exist to support a causal relationship between exposure to silicone materials and the acquisition or exacerbation of a variety of rheumatic and connective tissue disorders." *Id.* (citation omitted)

The Debtor ceased marketing the silicone gel for breast implantation in March of 1992. Two months later, the Food and Drug Administration ("FDA") ordered that implants containing the gel be taken off the market. *Id.* After the implants were withdrawn from the market, lawsuits against breast implant manufacturers dramatically increased

with more than 3,000 suits filed against the Debtor in 1992, followed by 8,000 and 7,000 new cases in 1993 and 1994, respectively. *Id.* Lawsuits were also filed in Canada against the Debtor. *Id.*

In 1992, the Judicial Panel on Multidistrict Litigation consolidated all the breast implant litigation brought in federal courts for administration of pre-trial matters pursuant to 28 U.S.C. § 1407. *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 793 F. Supp. 1098 (Jud. Pan. Mult. Lit. 1992). MDL-926 was assigned to the Honorable Sam C. Pointer, Jr. of the Northern District of Alabama.[3] Efforts were made to achieve a global settlement in the MDL-926 which led to a proposed $4,225,070,000 global settlement which was approved by Judge Pointer in 1994. *Lindsey v. Dow Corning Corp. (In re Silicone Gel Breast Implant Prods. Liab. Litig.)*, No. CV 92-P-10000-S, Civ. A. No. CV94-P-11558-S, 1994 WL 578353, at *1 (N.D. Ala. Sept. 1, 1994). The Debtor had agreed to contribute $2.02 billion to the global settlement. Approximately 440,000 women filed claims with the global settlement fund in 1995, many more than were anticipated by the parties. Based on the number of claims filed, the claimants would have received only a small percentage of what was previously promised. Some estimated that the defendant manufacturers would have had to jointly contribute another $24 billion to the settlement fund to pay all the claimants the amount promised. *In re Dow Corning Corp.*, 211 B.R. at 552. More than 15,000 class members chose to

---

[3] On April 3, 2000, Judge Pointer retired. The Honorable Edwin L. Nelson was assigned to succeed Judge Pointer as the MDL-926 panel judge.

opt out of the proposed settlement to preserve their right to pursue individual trials. *Id.* The global settlement fell apart in 1995.

The Debtor, faced with approximately 90 state trials in breast implant suits in 1995 with overlapping dates, believed that it would be financially and logistically impossible to defend itself. *Id.* In 1994 alone, the Debtor claimed it incurred more than $200 million in litigation costs. *Id.* The Debtor also faced a number of lawsuits involving nonbreast implant medical products. *Id.* at 553. As a result of its legal predicament, the Debtor filed chapter 11 bankruptcy on May 15, 1995. At that time, the Debtor was a defendant in over 19,000 individual silicone gel breast implant class actions, 45 putative silicone gel breast implant class actions, and 470 lawsuits involving nonbreast implant medical products at the time it filed its petition. *Id.*

Immediately after filing for bankruptcy, the Debtor sought to transfer all of the breast implant actions to the Eastern District of Michigan, including actions against its two shareholders, Dow Chemical and Corning, Inc. Other breast implant manufacturers, including Medical Engineering Corporation/Bristol-Myers Squibb, Minnesota Mining and Manufacturing Company and Baxter Healthcare Corp. and Baxter International, Inc. also requested that the cases against them be transferred to this Court. This Court granted the Debtor's request as to the claims against the Debtor but denied the transfer relating to the claims against the Debtor's shareholders and the non-Debtor breast implant manufacturers. *See In re Dow Corning Corp.*, 187 B.R. at 931-32 and *Memorandum Opinion and Order on the Non-Debtors' Motion to Transfer*, Case No. 95-CV-72397-DT

(E.D. Mich. Sept. 12, 1995). The Sixth Circuit reversed this Court's holding that the Court had jurisdiction over the Debtor's shareholders and the non-Debtor breast implant manufacturers and remanding the matter in order that this Court analyze the transfers under abstention principles. *See Lindsey v. O'Brien, Tanski, Tanzer and Young Health Care Providers of Connecticut (In re Dow Corning Corp.)(Lindsey I)*, 86 F.3d 482, 493-94 (6th Cir. 1996). On remand, this Court declined to exercise jurisdiction over the Debtor's shareholders and the non-Debtor breast implant manufacturers based on abstention principles. *See In re Dow Corning Corp.*, No. 95-CV-72397-DT, 1996 WL 511646 (E.D. Mich. July 30, 1996). On a Writ of Mandamus motion, the Sixth Circuit reversed this Court's ruling only with respect to the Debtor's shareholders. *See Lindsey v. Dow Chemical Co. (In re Dow Corning Corp.)(Lindsey II)*, 113 F.3d 565 (6th Cir. 1997). This Court thereafter entered an Order Transferring all breast implant claims against Dow Chemical and Corning, Inc. to the Eastern District of Michigan. *See Order Transferring Breast Implant Cases*, Case No. 95-CV-72397-DT (E.D. Mich. May 13, 1997). To date, there are approximately 14,795 breast implant cases against Dow Chemical and Corning, Inc. filed before this Court. The transferred cases before this Court against Dow Chemical and Corning, Inc. are currently held in abeyance pending the outcome of the Debtor's bankruptcy action.

The Debtor has since proceeded with its bankruptcy action. The United States Trustee appointed various committees, including the Official Committee of Tort Claimants which represented the interests of the thousands of personal injury claimants before the Bankruptcy Court. The other committees appointed by the United States Trustee

included the Official Committee for the Commercial Claimants and the Official Committee for the Physician Claimants. The Debtor proposed two plans of reorganizations which were vigorously opposed by the Tort Claimants' Committee. This Court and the Bankruptcy Court appointed a Mediator, Professor Francis E. McGovern, to assist in the negotiation of a consensual Plan between the Debtor, the Bankruptcy Committees, the United States Trustee, Dow Chemical and Corning, Inc. *See Order Appointing Mediator*, Case No. 97-CV-00001-DT (E.D. Mich. Nov. 11, 1997). The Debtor thereafter began to seriously negotiate with the various Committees, especially the Tort Claimants' Committee, which resulted in the proposed Amended Joint Plan filed by the Debtor and the Tort Claimants' Committee, which is currently before the Court for review.

The Court will address the following issues below: the appealability of the December 21, 1999 Opinion; the release and injunction decision addressed in the December 21, 1999 Opinion; the parties' specific arguments relating to the release and injunction; classification, treatment, fairness standards, and the best-interest-of creditors test; each parties' specific arguments relating to the classification, treatment, fairness, and the best-interest-of creditors test; the United States' appeal from the order addressing its motion to compel; the Case Management Order; and motions to intervene and/or file *amicus* briefs.

III. JURISDICTION AND STANDARD OF REVIEW

The district court has jurisdiction over appeals from final orders of the bankruptcy court in core proceedings. 28 U.S.C. §§ 157(b)(1) and 158(a)(1). The confirmation of a

plan is a core proceeding. 28 U.S.C. § 157(b)(2)(L). A bankruptcy court's findings of fact are reviewed under a clearly erroneous standard, while its conclusions of law are reviewed *de novo*. *Mapother & Mapother, P.S.C. v. Cooper (In re Downs)*, 103 F.3d 472, 476-77 (6th Cir. 1996); Bankr. R. 8013. Where a bankruptcy court's determination involves a mixed question of fact and law, the district court "must break it down into its constituent parts and apply the appropriate standard of review for each part." *Wesbanco Bank Barnesville v. Rafoth (In re Baker & Getty Fin. Servs., Inc.)*, 106 F.3d 1255, 1259 (6th Cir. 1997)(quoting *Investors Credit Corp. v. Batie (In re Batie)*, 995 F.2d 85, 88 (6th Cir. 1993)).

IV. MOTIONS TO INTERVENE AND/OR TO FILE AMICUS BRIEF

The Pennsylvania Physicians and Hospitals filed a Motion to Intervene in the appeal of the Class 5 Pennsylvania Claimants. Uneeda Laitinen, *pro se*, an implant claimant, also filed a Motion to Intervene in the appeals of the Dow Corning Plan for Reorganization. The Washington Legal Foundation filed a Motion to File Brief as *amicus curiae* in support of the Proponents' position regarding the Bankruptcy Court's December 21, 1999 Opinion. The parties seeking intervention cite Fed.R.Civ.P. 24 as authority to intervene in the appeals. Rule 24 allows intervention as of right or by permission in an "action" before the district court. *See* Fed.R.Civ.P. 24(a) and (b). "Action" is defined as a "[c]ivil action ... commenced by filing a complaint with the court." Fed.R.Civ.P. 2 and 3.

In the Motions to Intervene before this Court, the parties seek intervention in "appeals" filed by certain parties

from the Bankruptcy Court. The parties are not seeking to intervene in "actions" currently before the Court which were filed by way of a "complaint" but are seeking to intervene in "appeals" filed in this Court. The parties seeking to intervene have not cited any authority nor has this Court found any such authority, which would allow this Court, sitting as an appellate court, acting under the jurisdiction conferred to district courts by 28 U.S.C. § 158(a) to allow intervention. Bankruptcy Rules 8001 and 8002 set forth the manner in which a party may file an appeal from a bankruptcy court's order. If any party does not follow the rules regarding filing appeals from bankruptcy court orders, the Court does not have jurisdiction over that party on appeal under 28 U.S.C. § 158(a). "If a timely notice of appeal is not filed, no appeal may be taken later." *See* Committee Note, Bankr. R. 8002. The parties seeking to intervene in the appeals have not shown that this Court has the authority to allow non-parties to the appeal to intervene on appeal. The Court's interpretation of Fed.R.Civ.P. 24 is not authority for this Court to allow parties to intervene on appeal. Rule 24 applies to an original civil action filed before this Court by way of a complaint and not by way of a bankruptcy appeal. The Court will not allow the Pennsylvania Physicians and Pennsylvania Hospitals and Uneeda Laitinen to intervene on appeal. The Court, however, will consider the briefs as motions to file an *amicus curiae* brief.

Appellate courts have allowed briefs of an *amicus curiae*. The Federal Rules of Appellate Procedure 29 sets forth the manner in which an *amicus curiae* brief may be filed. *Amicus curiae* briefs may be filed only by leave of court or by consent of the parties stated in the brief. Fed.R.App.P. 29(a). The motion to file an *amicus curiae* brief must be

accompanied by the proposed brief and state the movant's interest *and* the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case. Fed.R.App.P. 29(b).

The Pennsylvania Physicians and Hospitals' brief states that their interest in the appeals stem from the Bankruptcy Court's December 21, 1999 Opinion regarding the release and injunctive issues. They state that neither the Proponents nor any other party have addressed their concerns that the December 21, 1999 Opinion may affect the physicians and hospitals' rights under the Amended Joint Plan. The Pennsylvania Physicians and Hospitals argue that their brief is therefore desirable and relevant to the disposition of the case. The Court finds that the Pennsylvania Physicians and Hospitals' brief addresses issues affecting the rights of the physicians and hospitals which no other party has raised before this Court with respect to the December 21, 1999 Opinion. The Pennsylvania Physicians and Hospitals' brief will be allowed as an *amicus curiae* brief.

Uneeda Laitinen's Motion for Intervention, received by the Clerk's Office on April 12, 2000, is essentially a concurrence with the arguments Appellant Marti Jacobs has brought before the Court. Laitinen, as a claimant in the bankruptcy proceeding, does have an interest in the appeals before the Court. Although not particularly helpful to the Court, to the extent that Laitinen seeks to place on the record her concurrence with Jacobs' position on appeal, the Court will allow Laitinen to so state on the record by allowing her "Motion for Intervention" to be filed as an *amicus curiae* brief.

The Washington Legal Foundation states that its interest in the appeals before the Court are twofold: 1) it has an interest in opposing the proliferation of product-liability class actions as a threat to free enterprise and prosperity; and 2) that the rule of law be upheld in bankruptcy laws. The Washington Legal Foundation believes that their brief would assist the Court and its views are relevant to the appeals. The Tort Claimants' Committee responded to the Washington Legal Foundation's motion stating that it has no objection if the Court wishes to accept the proposed *amicus curiae* brief but the Tort Claimants' Committee makes it clear that it only agrees with the Washington Legal Foundation's conclusion and not the basis for the conclusion. The Nevada Claimants oppose the Washington Legal Foundation's brief because they claim the brief would not assist the Court but merely advocates for the Shareholders. The Court will allow the Washington Legal Foundation's brief as an *amicus curiae* because it does have an interest in the appeals and the brief is relevant to the issues before the Court on appeal.

V. UNTIMELY NOTICE OF APPEAL

In its January 24, 2000 Scheduling Order regarding the appeals, the Court allowed parties to file motions to dismiss any pending appeal. Other than the motion to dismiss filed by the United States, no other motions were filed to dismiss any pending appeal. Other than the United States' motion to dismiss addressed by the Court above, the issue of whether certain parties filed timely Notices of Appeal was not argued vigorously by any party. Because filing a notice of appeal is jurisdictional, the Court will determine whether a party's filing of the notice of appeal was timely.

Bankruptcy Rule 8002(a) provides that a "notice of appeal shall be filed with the clerk within 10 days of the date of the entry of the judgment, order, or decree appealed from." Generally, a bankruptcy judge may extend the time for filing the notice of appeal if the request is made by a written motion and filed before the time for filing a notice of appeal has expired. Bankr. R. 8002(c)(1) and (2). However, the bankruptcy judge cannot extend the time for filing a notice of appeal if the order confirms a plan. Bankr. R. 8002(c)(1)(F). The 10 day period of time begins to run the day after the entry of the order and includes intermediate weekends and legal holidays. Bankr. R. 9006(a). The last day of the period is also included, unless it is a weekend day or a legal holiday. *Id.* As the rule is jurisdictional, failure to file a timely notice requires an appeal be dismissed for lack of jurisdiction. *Walker v. Bank of Cadiz (In re LBL Sports Ctr., Inc.)*, 684 F.2d 410, 412 (6th Cir. 1982). The rule has been strictly construed, requiring strict compliance with its terms. *Hotel Syracuse, Inc. v. City of Syracuse Indus. Dev. Agency (In re Hotel Syracuse, Inc.)*, 154 B.R. 13, 15 (N.D. N.Y. 1993). The notice of appeal itself is not a request for an extension under Rule 8002 since a request must be made by motion. *See Pryor v. Marshall*, 711 F.2d 63, 64-65 (6th Cir. 1983)(holding Fed.R.App.P. 4(a)(5) requires an appellant to file a timely motion requesting an extension of time).[4] Delays due to the mail are not grounds for excusable neglect. *See In re LBL Sports Center, Inc.*, 684 F.2d at 412. The Sixth Circuit has noted that although a person proceeding *pro se* may not fully

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[4] Rule 8002(c) is an adaptation of Federal Rule of Appellate Procedure 4(a)(5). Fed.R.Bank.P. 8002 advisory committee's notes.

understand the rules or procedure, he or she is still required to comply with the rules and that a *pro se* status does not exempt a person from complying with the rules. *See Jourdan v. Jabe*, 951 F.2d 108, 110 (6th Cir. 1991).

A review of the record before the Court and the Bankruptcy Court indicates that Notices of Appeal listed below were not timely filed; therefore, the Court has no jurisdiction over those appeals. A party seeking an appeal from the November 30, 1999 Confirmation Order must have filed a notice of appeal before the Bankruptcy Court on or before December 10, 1999. A notice of appeal from the December 21, 1999 Opinion must have been filed on or before January 3, 2000 (the New Year holiday, January 1, a Saturday, was observed on December 31, 1999). The following appeals were untimely filed and will be dismissed for lack of jurisdiction:

Case No.	Date filed with Bankruptcy Court	Appellant
99-CV-76007	12/13/99	Beatrix Shishido, *pro se*
99-CV-76008	12/13/99	Karen L. Hustead, *pro se*
99-CV-76009	12/13/99	Pamela Dowd, *pro se* and Maribeth West, *pro se*
99-CV-76063	12/16/99	Class Five Pennsylvania Claimants, Pennsylvania Coordinated Silicone Breast Implant Litigation
00-CV-70076	12/30/99	Rita Altig, et al.

00-CV-70176	01/10/00	Hartford Accident & Indemnity Co., et al.
00-CV-70177	01/10/00	Lloyds of London, et al.

Appellants Shishido, Hustead, Dowd and West, the Class Five Pennsylvania Claimants, and the Altig Claimants filed their notices of appeal from the November 30, 1999 Confirmation Order beyond the 10 day appeal time period of December 10, 1999. Although the Altig Claimants' Notice of Appeal indicates they were appealing from the Bankruptcy Court's December 21, 1999 Opinion, the substance of their appeal goes to the issues addressed in the November 30, 1999 Confirmation Order and not to the issues raised in the December 21, 1999 Opinion which modified the November 30, 1999 Confirmation–specifically the release and injunction provisions issues. The Altig Claimants do not appeal the Bankruptcy Court's opinion on the release and injunction provisions raised in its December 21, 1999 Opinion. The Altig Claimants have not argued that the balance of the Bankruptcy Court's December 21, 1999 Opinion modified its November 30, 1999 Confirmation Order. The Insurers notices of appeal from the December 21, 1999 Opinion regarding the release and injunction provisions were also filed beyond the 10 day appeal time period which expired on January 4, 2000. Because the briefs on appeal submitted by the parties address issues that have been raised by other parties who filed timely appeals, the Court will consider the briefs submitted as *amicus curiae* briefs.

VI. APPEALABILITY OF THE DECEMBER 21, 1999 OPINION

A. Parties filing Appeals and Motions regarding the December 21, 1999 Opinion

The Shareholders, Dow Chemical and Corning, Inc., and the Proponents, the Debtor and the Tort Claimants' Committee, filed separate appeals from the December 21, 1999 Opinion seeking review of the Bankruptcy Court's release and injunction opinion. A Motion to Vacate the December 21, 1999 Opinion and a Motion to Withdraw the Reference were also filed by the Proponents relating to the injunction issue. The Shareholders filed a document before the Bankruptcy Court entitled "Notice of Shareholders of Failure to Satisfy Condition" which was stricken by the Bankruptcy Court. The Shareholders filed an appeal of the Bankruptcy Court's Order striking the Notice. Certain insurance companies also filed an appeal from the December 21, 1999 Opinion. A Motion to Dismiss the appeals relating to the December 21, 1999 Opinion was filed by the United States of America ("United States").

B. United States' Motion to Dismiss Appeal

1. Background of the December 21, 1999 Opinion

The United States filed a Motion to Dismiss the Appeals relating to the December 21, 1999 Opinion of the Bankruptcy Court addressing the Release and Injunction provisions of the Joint Plan because the Notices of Appeals were filed more than ten days after the November 30, 1999

Confirmation Order. The United States, joined by several parties (the "Plan Opponents"), argue that any appeal from the November 30, 1999 Confirmation Order should have been filed within ten days from that date, as opposed to ten days from December 21, 1999, the date the Opinion was issued on the Release and Injunction provisions. The Proponents, Shareholders and the Settling Insurers argue that their Appeals are timely because the December 21, 1999 Opinion changed the November 30, 1999 Confirmation Order as to the release and injunction issues.

The Amended Joint Plan provides that "All Persons who have held, hold or may hold Products Liability Claims, whether known or unknown, shall be deemed to have forever waived and released all such rights or claims against the Released Parties." Amended Joint Plan, § 8.3. The released parties include the "Shareholders" and the "Proponents". The Amended Joint Plan further provides that "all Persons who have held, hold, or may hold Released Claims, whether known or unknown . . . shall be permanently enjoined" from pursuing those claims against the Released Parties. Amended Joint Plan, § 8.4.

In response to the Amended Joint Plan, several claimants vehemently argued that the injunction provision violated the Bankruptcy Code. According to the Proponents and Shareholders, the crux of the debate centered around whether a release that applied to all claimants was legal. Even though there was disagreement over the validity of the injunction provisions, the Proponents argue that all parties involved agreed that the scope of the provision was to release the Shareholders and Proponents from all product liability claims, regardless of whether the claimants voted for or

against the Joint Plan or did not vote at all. In support of this assertion, the Proponents and Shareholders cite excerpts from filings made by the Nevada objectors, the Australian complainants, and the Official Committee of Unsecured Creditors which reference the injunction provision as applying to "all" tort claimants and the resulting lack of options.

The Proponents and Shareholders believe that the release and injunction sections of the Joint Plan make it clear that they are released from any and all products liability claims. This means that anyone with a claim relating to an implant or any of the other claims being released will not be able to sue or continue suit against any of the released parties, including Dow Corning, Dow Chemical, Corning Inc. and the Settling Insurers.

The Bankruptcy Court's Confirmation Order stated that "[t]he Plan, including its attached and incorporated separate agreements, compromises, settlements, and assumptions and rejections of executory contacts and unexpired leases, is confirmed." *Order Confirming Amended Joint Plan of Reorganization as Modified*, p.1. The Confirmation Order does not specifically address the release and injunction provisions at issue. The Findings of Fact and Conclusions of Law state the following:

> 21. The Settling Physicians, the Settling Insurers, Corning, Inc. and The Dow Chemical Company will all make important contributions to the reorganization as part of a confirmed Plan.

22. The release and injunction provisions with respect to the Settling Physicians, Settling Insurers, Corning, Inc. and The Dow Chemical Company are essential to reorganization pursuant to this Plan.

23. A large majority of the creditors impacted by the release and injunction provisions approved the Plan.

24. There is a close connection between the claims of the Settling Physicians, the Settling Insurers, Corning, Inc. and the Dow Chemical Company on the one hand and the claims against the Debtor on the other hand.

25. The Plan provides for the payment of all of the claims affected by the release and injunction provisions of the Plan.

November 30, 1999 Findings of Fact and Conclusions of Law Regarding Confirmation of the Joint Plan of Reorganization, p. 5. The Conclusions of Law state:

D. The Plan complies with the applicable provisions of title 11 United States Code. 11 U.S.C. § 1129(a)(1). See separate opinion to be issued later with respect to this issue.

Id.

The Proponents and Shareholders argue that the findings set forth in ¶¶ 21-25 are precisely the factors that courts have held may in certain circumstances warrant approval of plans of reorganization containing release and injunction provisions that bar claims against non-debtors by all claimants, regardless of how or whether they voted on confirmation. *See November 30, 1999 Findings of Fact*, ¶¶ 21-25. The United States agrees with the Proponents and Shareholders in this regard and maintains that the November 30, 1999 Confirmation Order was in fact an approval of the 19 reorganization plan. As a result of the November 30, 1999 Confirmation Order, a number of claimants who had voted against the Joint Plan, including the United States, promptly filed Notices of Appeal.

On December 21, 1999, the Bankruptcy Court issued an opinion which was described as "the last in a series of opinions serving to supplement and explain the findings and conclusions previously submitted." *In re Dow Corning Corp. (Opinion on Best-Interests-of-Creditors Test)*, 244 B.R. at 726. Contained within this opinion was a discussion regarding the Joint Plan's release and injunction provisions. The Bankruptcy Court opined that those provisions apply only to claimants who voted in favor of confirmation, but not to claimants who voted against the Joint Plan or who did not vote at all. In essence, the Bankruptcy Court reasoned that it lacked the power to release claims held by non-voters or objectors. The Bankruptcy Court also noted that since the release and injunctive provisions were only applicable to those claimants who voted in favor of the Plan, there was no need for an injunction. According to the Bankruptcy Court, the creditors that voted for the Plan agreed to relinquish their

claims against the released parties, and as a result, the Proponents would not suffer irreparable harm. *Id.* at 745-46.

The Proponents and the Shareholders filed notices of appeal within ten days of the December 21, 1999 Opinion asserting that the Opinion significantly altered the previous judgment entered by the court. The United States moved to dismiss the appeals, arguing that (1) the Proponents and Shareholders failed to appeal within ten days of the November 30 Confirmation Order, and (2) the December 21 Opinion is not independently appealable.

2. Finality of the December 21, 1999 Opinion

This Court has jurisdiction to hear appeals "from final judgments, orders and decrees" entered by bankruptcy courts. 28 U.S.C. § 158(a). The time limit to pursue an appeal in a bankruptcy case is more accelerated than that applicable to generic non-bankruptcy civil cases. Specifically, Rule 8002(a) of the Bankruptcy Rules states that "[t]he notice of appeal shall be filed with the clerk within 10 days of the date of the entry of the judgment, order or decree appealed from."

The Proponents and Shareholders argue that they filed a notice of appeal from the December 21 opinion as well as from the November 30 Confirmation Order to the extent that it was amended or modified by the December 21 Opinion. It is undisputed that the Proponents failed to appeal within the required ten days of the November 30, 1999 Order, but did file a Notice of Appeal within the ten days after the December 21 Opinion was issued. The question is whether the December 21 Opinion satisfies the requirement for a final judgment as

outlined in 28 U.S.C. § 158(a). The Court finds the Opinion is a final order and this Court has jurisdiction to hear the Proponents and Shareholders' appeal pursuant to Bankruptcy Rule 8002 and 28 U.S.C. § 158(a).

The Supreme Court has promulgated a test for determining when parties should be allowed to appeal an order entered subsequent to a court's final judgment. The Supreme Court wrote:

> [T]he mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought. Only when the lower court changes matters of substance or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality.

Federal Trade Commission v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206 (1952). The Supreme Court also indicated that the question of whether the time for petitioning for appeal should be enlarged "cannot turn on the adjective which the court below chose to use in the caption of its second judgment." *Id.* at 212.

This test was adopted by the Sixth Circuit in *Green v. Nevers*, 196 F.3d 627 (6th Cir. 1999) and *Cuyahoga Valley Railway Company v. Tracy*, 6 F.3d 389 (6th Cir. 1993). In *Green,* a plaintiff attempted to appeal an order that was entered subsequent to a court's final decree. The Sixth Circuit reasoned that the second order merely amended the first order by correcting "a minor technical error" and therefore did not toll the time for filing a notice of appeal. *Green*, 196 F.3d at 631. In accordance with the *Minneapolis-Honeywell* case, the Sixth Circuit concluded that because there were no substantive changes or resolution of genuine ambiguity, the second order did not restart the time for appeal. *Id.*

Similarly in *Tracy*, the Sixth Circuit determined that the defendants' attempt to appeal from a subsequent order which it contended modified certain aspects of the original order was untimely. The defendants argued that because the second order modified certain aspects of the court's first order, every item in the first order was subject to appeal. The issue that the defendants sought for review was not altered or even mentioned in the second court order. The *Tracy* court held that "the relevant case law in no way suggests that once one issue has been modified, all of the issues from the original order are fair game for appeal." *Tracy*, 6 F.3d at 395. The district court's later modification of the first order was completely unrelated to the issue the defendants disputed and therefore did not alter the state of repose. *Id.* The Sixth Circuit has also determined that "[A] decision is final for purposes of appeal if an appeal is the only method of obtaining review." *United States v. Lee*, 786 F.2d 951 (9th Cir. 1986).

Here, the December 21 Opinion revised the November 30 Confirmation Order in a material way. The Bankruptcy Court specifically stated in its December 21, 1999 Opinion that claimants who voted against the Joint Plan or who did not vote at all, are not deemed to have released the nondebtors and could still bring suit against the Proponents and the Shareholders. For the first time, the Bankruptcy Court articulated the scope and effect of the release and injunction on all of the parties. The November 30 Confirmation Order did not elaborate on or explain or interpret these provisions. The Bankruptcy Court simply stated that "the Plan, including its attached and incorporated separate agreements, compromises, settlements, and assumptions and rejections of executory contracts and unexpired leases [was] confirmed." *November 30, 1999 Confirmation Order,* p.1. The Findings of Fact and Conclusions of Law issued on the same date, reference the provisions, but fail to detail the ramifications they have on the parties. The Findings of Fact, in ¶¶ 21-25, address factors that courts have articulated to support the imposition of releases and injunctions. The Conclusions of Law do not address the injunction and release issues but merely state that "[t]he Plan complies with the applicable provisions of title 11 United States Code. 11 U.S.C. § 1129(a)(1). See separate opinion to be issued later with respect to this issue." *November 30, 1999 Findings of Fact*, ¶ D. Nowhere in the Bankruptcy Court's November 30, 1999 Findings of Fact and Conclusions of Law nor the November 30, 1999 Confirmation Order does it expressly state that the release and injunction provisions only apply to those who approved the Plan.

The December 21 Opinion revised the scope of the injunction/release provisions and made these provisions applicable only to those parties who voted in favor of the

confirmation plan. If this Court accepts the United States' argument and concludes that the November 30 Confirmation Order was the Bankruptcy Court's final decree, then the entire plan, as written, was confirmed on that date. The release and injunction provisions would then apply to "*all* Persons who have held, hold, or may hold Products Liability Claims whether known or unknown." Amended Joint Plan, § 8.3 (italics added). Since, this was clearly not the Bankruptcy Court's interpretation when the November 30 Confirmation Order was entered, the subsequent December 21 Opinion changed the legal rights and obligations of the parties, as written under the Joint Plan.

The Proponents seek review of the subject matter that was substantially altered by the December 21 Opinion. As noted in *Tracy,* an appeal may be barred if the parties seek review of an entire order simply because one provision has been altered by a subsequent judgment. In the instant case however, the Proponents seek review of the only significant change in the December 21 Opinion, specifically, Section IV of the Opinion--the applicability and scope of the release/injunction provisions.

If this Court denies the Proponents' review of their appeal, there will be no alternative means for them to seek review of the December 21 Opinion. Based on *Lee*, the opinion qualifies as a final decision for purposes of appeal. In accordance with *Minneapolis-Honeywell* and *Lee*, the December 21 Opinion is appealable. The December 21 Opinion materially altered the November 30 Confirmation Order, and the Proponents have no other way to assert their objections except through appeal. Since the Bankruptcy Court did not specifically address the injunction and release issues

either in its Findings of Fact and Conclusions of Law or in the November 30 Confirmation Order, the Proponents reasonably believed that the reorganization plan had been confirmed as written, and all issues had been settled with finality. The Appellants who objected to the Plan also reasonably believed that the injunction and release provisions had been confirmed by the Bankruptcy Court's November 30 Confirmation Order as evidenced by their own timely appeals of the confirmation of those provisions.

As indicated above, this Court has jurisdiction to hear appeals "from final judgments, orders, and decrees" entered by bankruptcy courts. 28 U.S.C. § 158(a). The Sixth Circuit has adopted the Supreme Court's definition of a final order as one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Whittington v. Milby*, 928 F.2d 188, 191 (6th Cir. 1991)(quoting *Catlin v. United States,* 324 U.S. 229, 233 (1945)). This Circuit has also emphasized that the requirement of finality is to be given a practical rather than a technical construction. *Id.* (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 171 (1974)).

In cases of marginal finality, the Sixth Circuit has adopted what has become known as the *Gillespie* doctrine. *Vause v. Capital Polybag, Inc.*, 886 F.2d 794, 797 (6th Cir. 1989). In certain close cases where finality cannot be conclusively resolved, the court has determined that the "danger of denying justice by delay outweighs the inconvenience and costs of piecemeal review, particularly when the questions on appeal are fundamental to the further outcome of the case." *Id.* (quoting *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964)). The *Gillespie* doctrine, therefore, "permits the courts of appeals to decide the merits

in cases of marginal finality where the course of litigation would be impeded, rather than advanced, by dismissing the appeal." *Id.*

The Proponents contend that the Bankruptcy Court's statement on January 10, 2000 that the December 21 Opinion "did not amend, modify or otherwise change the order confirming the plan" does not establish that the December 21 Opinion did not modify the November 30 Confirmation Order. Nor should it matter that the December 21 ruling is labeled an "opinion" instead of an "order." In support of this contention, the Proponents quote the Ninth Circuit which has stated that:

> [f]or purposes of determining appealability of an order, "the trial judge's characterization of his own action cannot control the classification of the action." The court should instead focus on the effect of the ruling rather than the label placed on it.

Lee, 786 F.2d at 955(quoting *United States v. Scott*, 437 U.S. 82, 96 (1978))(other citations omitted). The Proponents also cite *American Motors Corp. v. FTC*, 601 F.2d 1329, 1331 n.2 (6th Cir. 1979) and *United States v. Battisti*, 486 F.2d 961, 967 (6th Cir. 1973), which stand for the proposition that appealability of an order depends on its substantial effect versus the label attached to it.

The argument asserted by the Proponents has been upheld in the Seventh and Third Circuits. In *Charles v. Daley*, 799 F.2d 343 (7th Cir. 1986), a district court entered an award of attorney fees in favor of the plaintiff on October

1, 1984. The order awarded fees but did not stipulate which defendants would be responsible for payment. The accompanying opinion said that the "defendants" would pay, but it referred to three intervenor-defendants as intervenors. One reading of the order made the intervening defendants jointly and severally liable for the $200,000 attorney fee award. Another reading of the order did not make them liable at all. The intervenors requested clarification and modification of the order and filed a timely motion to suspend the finality of the judgment until the court ruled on their motion. On April 22, 1985, the district court denied their motion for clarification and modification and entered another order indicating that the plaintiff's fees and costs would be borne equally by the defendants. The district court's April 22 order both denied the intervenors' motion and amended the original judgment entered on October 1, 1984.

The *Daley* court applied the holding of *Minneapolis-Honeywell* and concluded that there was a genuine ambiguity in the court's original order dated October 1, 1984. The subsequent April 22 order not only dispelled the ambiguity but also made substantive changes. By dividing liability among the groups of defendants, and making the intervenors jointly and severally liable for the plaintiff's attorney fees and costs, the April 22 order became a new order, affording the aggrieved parties time to seek alteration or appeal. *Daley*, 799 F.2d at 348. The *Daley* court noted that "the sort of alteration that restarts all periods of time is one that changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered. *Id.* (quoting *Minneapolis-Honeywell*, 344 U.S. at 211). The Third Circuit has also determined that "an order substantively changing a judgment, constitutes a new judgment with its own time for appeal at least where the

change is the subject matter to be reviewed." *Keith v. Truck Stops Corporation of America*, 909 F.2d 743, 746 (3rd Cir. 1990).

Applying the rationale of the Ninth, Seventh and Third Circuits to the case at bar, the December 21 Opinion is appealable. A trial court judge's characterization of the rulings he/she enters is of no moment. It is the effect of these rulings which determines their appealability. The December 21 Opinion clarified and substantively changed the applicability of the release and injunction provisions.

Applying the *Whittington* holding to the case at bar, it is practical to interpret the December 21 Opinion as the Bankruptcy Court's final order on the release and injunction issues. As indicated in *Whittington*, an order is not final unless all issues have been addressed and resolved. It is clear that this requirement was not satisfied until the Bankruptcy Court issued the December 21 Opinion on the release and injunction issues. Since all parties placed significant importance on the release and injunction provisions, it is impractical to interpret the November 30 Order as final when key components to the reorganization plan were changed by the December 21 Opinion.

The *Gillespie* doctrine directs that any issue that is fundamental to the future outcome of a case should meet the finality requirement and should be appealable. There is no question that this is a fundamental issue that has the potential of seriously affecting the Proponents and/or Shareholders in the future. Applying the *Gillespie* doctrine to the facts of the instant case, it is clear that the requirement of finality has

been met, and the Proponents and Shareholders will be allowed to appeal the December 21 Opinion.

3. Notice/Due Process

The Proponents and Shareholders contend that it would violate due process if they were barred from appealing the December 21 ruling when they filed notices of appeal within ten days of the Bankruptcy Court's announcement of notification. According to the Proponents, "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The notice must also be of such nature "to reasonably convey the required information and afford a reasonable time for those interested to make their appearance." *Id.* Applying the *Mullane* holding, the Sixth Circuit has also determined that the failure to give adequate notice is violative of procedural due process. *Verba v. Ohio Casualty Insurance Co.*, 851 F.2d 811, 815 (6th Cir. 1988).

When the Bankruptcy Court issued its Findings of Fact and Conclusions of Law on November 30, the court indicated that several of its findings would be more fully explained in a subsequent separate opinion. There was no indication, however, that the language confirming the release and injunction provisions would be interpreted other than as intended by the Proponents. The parties reasonably concluded that the Bankruptcy Court had adopted these provisions as written in the Joint Plan. This is evidenced by the actions of

the parties following the issuance of the November 30 Confirmation Order. The Nevada Claimants specifically stated that the basis of their appeal centered around the permanent injunction provision. The United States also questioned the injunction provision and whether the bankruptcy court erred in confirming a Plan which releases entities from the claims of all parties and enjoins all parties from all actions against the Released Parties for future claims. The Proponents, along with the Plan Opponents, thought that the release and injunction provisions, as written in the Joint Plan, required "all" claimants to release the Debtor, the Shareholders and the Settling Insurers. Not until the issuance of the December 21 Opinion did the parties become aware of the Bankruptcy Court's reasoning. The Bankruptcy Court's interpretation of the release and injunction provisions altered the plain language of the reorganization plan from "*all* persons who have held, hold, or may hold Released Claims, whether known or unknown" to make the provisions applicable only to "those persons who accepted the plan." *Best-Interests Opinion,* 244 B.R. at 745.

Upon review of the November 30 Confirmation Order and Findings of Fact and Conclusions of Law, there is no indication that the court intended to interpret the release and injunction provision as the Bankruptcy Court finally did in its December 21 Opinion. The Proponents had no formal notice of the Bankruptcy Court's reasoning or intentions with regard to the release/injunction provisions. Once the December 21 Opinion was issued, putting the Proponents on notice of the court's final holding, a timely appeal was filed. As noted in *Mullane*, because the Proponents were not given notice of the applicability of the November 30 Confirmation Order, it would be a violation of due process to deny them an

opportunity to present their objections to the December 21 Opinion.

4. Conclusion

The December 21 Opinion qualifies as a final judgment which gives this Court jurisdiction to hear the Proponents' appeal. The November 30 Confirmation Order stated that the amended reorganization plan had been confirmed in its entirety. From this statement, there is no indication that the Bankruptcy Court planned by its subsequent opinions to interpret any of the Plan's provisions differently from the plain language of the Plan. As a result, the Proponents were not given notice of their need to appeal until after the Bankruptcy Court issued the December 21 Opinion which substantially altered the applicability of the release and injunction provisions. It would be violative of procedural due process to deny the Proponents the only opportunity they have to address their objections to the modifications contained within the December 21 Opinion. The December 21 Opinion falls within the definition of a final order. It was a clear articulation by the Bankruptcy Court of its holding regarding the release and injunction provisions.

C. Proponents' Motion to Withdraw the Reference

Alternatively, the Proponents have filed a Motion to Withdraw the Reference should the Court decide not to consider their appeal on the merits. 28 U.S.C. § 157(d) provides that "[t]he district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause

shown." "Cause" is not defined. In order to determine "cause,"

> The district court should consider the goals of promoting uniformity in bankruptcy administration, reducing forum shopping and confusion, fostering the economical use of the debtors' and creditors' resources, and expediting the bankruptcy process.

Holland America Ins. Co. v. Succession of Roy, 777 F.2d 992, 999 (5th Cir. 1985). Although not explicitly required for withdrawal *sua sponte*, it has been held by some courts that after a core proceeding is finally disposed of by the bankruptcy court, a district court must proceed under its appellate jurisdiction as opposed to utilizing its original jurisdiction by withdrawing the reference. *In re Pruitt*, 910 F.2d 1160, 1168 (3rd Cir. 1990). Once core proceedings become final, withdrawing the reference would be without cause. *Id.; Carlton v. Baww, Inc.*, 751 F.2d 781, 788 n.10 (5th Cir. 1985). The Seventh Circuit has stated:

> The timing of the court's withdrawal of the reference here, even if not improper, seems to be in conflict with the statutory objectives of utilizing the expertise of bankruptcy judges, reducing forum shopping and preserving the appellate processes provided by the Bankruptcy Act.

In the Matter of Powelson, 878 F.2d 976, 983 (7th Cir. 1989). Although the statute does not expressly forbid the withdrawal of reference after a final order has been entered,

such withdrawal appears to violate the intent of Congress as reflected in the statutory scheme taken as a whole. *Id.* at 983-984. Congress has established a structure within the bankruptcy court system which allows for the district courts to supervise the bankruptcy courts in two different capacities: first, withdrawal of the reference and the reinstatement of the district court's original jurisdiction under 28 U.S.C. § 158(d) and second, through the appellate process in 28 U.S.C. § 157(a). "[A]llowing the withdrawal of the reference to occur at any time, and especially after the appeal process has begun, would seriously disturb the statutory objective of 'preserving the appellate processes provided by the Bankruptcy Act.'" *In re Pruitt*, 910 F.2d at 1169 (concurring opinion)(quoting *Powelson*, 878 F.2d at 983). Although the precise issue has not been addressed by the Sixth Circuit, the Sixth Circuit has stated that short circuiting the orderly procedure for the administration of bankruptcy stays without recognizing the legal effect of the bankruptcy stay to a case before the trial court is not favored. *NLT Computer Servs. Corp. v. Capital Computer Sys., Inc.*, 755 F.2d 1253, 1258 (6th Cir. 1985).

A final confirmation order has been entered in this matter. The Court will not on this occasion withdraw the reference at this late stage based on the statutory scheme as a whole. The Court will not exercise both its original and appellate jurisdiction to review the issues raised in the same order.

VII. RELEASE AND INJUNCTION PROVISIONS

A. Sections 8.3 and 8.4 of the Joint Plan

Section 1129(a) sets forth 13 requirements for

confirmation of the plan. One of those requirements is found in 11 U.S.C. § 1129(a)(1) which provides that a plan cannot be confirmed unless it "complies with the applicable provisions of [the Bankruptcy Code]." The Bankruptcy Court has the authority to approve reorganization plans, including any provision "not inconsistent with the applicable provisions of [the Code]." 11 U.S.C. § 1123(b)(6).

Section 8.3 of the Plan (the "release provision") provides that personal-injury claims against various parties are deemed waived and released upon the effective date of the confirmation of the Plan. Section 8.4 (the "injunction provision") provides that holders of the claims are enjoined from commencing or continuing any action seeking to enforce their claims against the Released Parties, including the Debtor-Affiliated Parties (the Debtor, the Reorganized Debtor, the Joint Ventures and Subsidiaries, and their respective Representatives), the Shareholder-Affiliated Parties (the Shareholders and their past and present Affiliates and their Representatives), the Settling Insurers, the Settling Physicians, and the Settling Health Care Providers. Amended Joint Plan, §§ 8.3, 8.4.

In its opinion issued on December 21, 1999, the Bankruptcy Court, explained its Findings of Fact as to the release and injunction provisions. The Bankruptcy Court concluded that the release and injunction provisions are consistent with the Bankruptcy Code. *Best-Interests Opinion,* 244 B.R. at 740. However, the Bankruptcy Court interpreted the provisions to apply only to those persons who voted in favor of the Plan based on non-bankruptcy law, in particular

the *Grupo Mexicano* case.[5] The Bankruptcy Court found that §§ 8.3 and 8.4 are permissible and that the Plan can be confirmed by applying §§ 8.3 and 8.4 only to those creditors who voted to accept the Plan. The Bankruptcy Court concluded that §§ 8.3 and 8.4 are appropriate provisions and not inconsistent with the Code when applied in this way. *Best-Interests Opinion,* 244 B.R. at 745. The Bankruptcy Court noted that if the terms of the Plan were plain and construed to include "all persons" holding claims of the type described in the provisions, then the court would have no choice but to deny confirmation of the Plan. 244 B.R. at 745.

Prior to the issuance of the December 21, 1999 Opinion appeals were filed from the November 30, 1999 Confirmation Order on the release and injunction issues by certain personal injury claimants arguing that the release and injunction provisions releasing, in particular, the Shareholders, are improper. After the Bankruptcy Court's issuance of its December 21, 1999 Opinion, the Proponents and the Shareholders filed appeals on the release and injunction portion of that Opinion claiming that the Bankruptcy Court's interpretation of the release and injunction provisions as binding only on those who voted to accept the Plan was in error.

There is no dispute that the Debtor is discharged and, essentially released, from the various claims against it. The Court will address below the state of the law on the release and injunction issues, as it applies to non-debtors, whether the

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[5] *Grupo Mexicano de Desarrollo v. Alliance Bond Funds, Inc.*, 527 U.S. 308 (1999).

Bankruptcy Court erred in its interpretation of the release and injunction provisions, and each party's arguments as to whether the release and injunction provisions are proper.

B. Jurisdiction/Authority

The release and injunction provisions of the Plan are construed as a non-debtor discharge. The starting place for analysis of non-debtor discharge is whether the bankruptcy court has jurisdiction under 28 U.S.C. § 1334(b). *Matter of Zale Corp.* (*Feld v. Zale Corp.*), 62 F.3d 746, 751 (5th Cir. 1995). Generally, bankruptcy jurisdiction is not conferred for the convenience of those not in bankruptcy. *In re Pacor, Inc. v. Higgins,* 743 F.2d 984, 996 (3rd Cir. 1984), *overruled on other grounds by Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 134-35 (1995). Unless the parties involved are the debtor and the creditors, or the bankruptcy court has "related to" jurisdiction over certain parties, the bankruptcy court has no jurisdiction to enter orders pertaining to parties who are not related to the bankruptcy action.

The Released Parties under §§ 8.3 and 8.4 of the Plan include, the Settling Physicians, the Settling Health Care Providers, the Debtor-Affiliated Parties, the Shareholder-Affiliated Parties, and the Settling Insurers. Amended Joint Plan, § 8.3. In this case, the Sixth Circuit has ruled that § 1334(b) "related to" jurisdiction exists over the actions pending against the Shareholders, Dow Chemical and Corning, Inc. *In re Dow Corning Corp.* (*Lindsey I*), 86 F.3d at 494. The Sixth Circuit has also ruled that § 1334(b) jurisdiction covers the joint insurance policies between the Debtor and the Shareholders. *Id.* at 495. This Court also has § 1334(b) jurisdiction over the Settling Physicians and the

Settling Health Care Providers because they have claims against the Debtor for indemnification and/or contribution and some physicians have direct tort claims against the Debtor arising from the Debtor's misrepresentations in the marketing, sale, and provision of breast implants and other products for use in a Physician Claimant's medical practice.

The next consideration is whether the bankruptcy court has the authority to enter the particular kind of relief sought--a non-debtor discharge. *American Hardwoods, Inc. v. Deutsche Credit Corp.*, 885 F.2d 621, 624 (9th Cir. 1989). While a bankruptcy court may have subject matter jurisdiction to hear a dispute between non-debtors, it may lack the authority to enter a particular type of relief. *In re Arrowmill Development Corp.* , 211 B.R. 497, 503 (Bankr. D. N. J. 1997).

C. Discharge/11 U.S.C. § 524(e)

In bankruptcy, a discharge is an involuntary release by operation of law of asserted and nonasserted claims by a creditor against an entity who has filed a petition under the bankruptcy code and who has abided by its rules. *In re Arrowmill*, 211 B.R. at 504. Upon confirmation of a plan, a Chapter 11 debtor receives a discharge of its debts which arose before confirmation. 11 U.S.C. § 1141(d)(1). 11 U.S.C. § 524(e) limits the scope of the discharge. A "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity, for such debt." 11 U.S.C. § 524(e). The circuit courts are divided over the issue of non-debtor discharge–whether a party, other than a debtor, may receive a discharge of a debt in the context of the debtor's bankruptcy action. Three lines

of cases have been identified emerging from the various decisions. *In re Arrowmill*, 211 B.R. at 504.

The first line of cases holds that the bankruptcy court has the authority to confirm reorganization plans which discharge non-debtors even if there are objecting creditors. *Monarch Life Ins. Co. v. Ropes & Gray* (*In re Monarch Capital Corp.*), 173 B.R. 31 (D. Mass. 1994), *aff'd*, 65 F.3d 973, 980 (1st Cir. 1995); *MacArthur Co. v. Johns-Manville Corp.* (*In re Johns-Manville Corp.*), 837 F.2d 89, 93 (2d Cir. 1988); *Securities and Exchange Comm'n v. Drexel Burnham Lambert Group, Inc.* (*In re Drexel Burnham Lambert Group, Inc.*), 960 F.2d 285, 293 (2d Cir. 1992); *Menard-Sanford v. Mabey* (*In re A.H. Robins Co., Inc.*), 880 F.2d 694 (4th Cir. 1989); *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1053 (5th Cir. 1987); and *Matter of Munford, Inc.* (*Munford v. Munford, Inc.*), 97 F.3d 449, 454 (11th Cir. 1996).

The second line of cases holds that the bankruptcy court does not have the authority to discharge or release a non-debtor. *In re Zale Corp.*, 62 F.3d at 756 (5th Cir.); *Hall v. Nat'l GypsumCo.*, 105 F.3d 225, 229 (5th Cir. 1997); *Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159, 163 (7th Cir. 1994); *In re American Hardwoods*, 885 F.2d at 626 (9th Cir.); *Resorts Int'l, Inc. v. Lowenschuss* (*In re Lowenschuss*), 67 F.3d 1394, 1402 (9th Cir. 1995); and *In re Western Real Estate Fund, Inc.* (*Landsing Diversified Properties-II v. First Nat'l Bank and Trust Co. of Tulsa*), 922 F.2d 592, 602 (10th Cir. 1990), *modified sub nom., Abel v. West*, 932 F.2d 898 (10th Cir. 1991).

The third line of cases holds that bankruptcy courts may discharge or release non-debtors from their debts only if

the affected creditors consent. *In re AOV Indus., Inc.*, 792 F.2d 1140, 1145-46 (D.C. Cir. 1986); and *Matter of Specialty Equip. Co., Inc.*, 3 F.3d 1043, 1047 (7th Cir. 1993) (disavowing its prior case, *Union Carbide Corp. v. Newboles*, 686 F.2d 593 (7th Cir. 1982), which prohibited non-debtor releases.).

The Third Circuit recently addressed the validity of non-debtor releases although it declined to establish a rule regarding the conditions under which non-debtor releases and permanent injunctions are appropriate or permissible. *In re Continental Airlines* (*Gillman v. Continental Airlines*), 203 F.3d 203, 214 (3rd Cir. 2000). The Third Circuit ruled that under any of the tests recognized by various courts, the non-debtor release provision before that court could not pass muster. *Id.* The Third Circuit recognized the following factors required of non-consensual releases: 1) fairness; 2) necessity to the reorganization; and 3) specific factual findings to support the conclusions. *Id.* Although the Third Circuit noted that several of the bankruptcy courts in its circuit have stated that non-debtor releases are permissible only if consensual, at least with respect to direct (as opposed to derivative) claims, the Third Circuit noted that none of these cases involved the mass litigation found in *Robins, Manville, or Drexel*. *Id.* n.11.

The Sixth Circuit has not ruled upon the issue of whether a bankruptcy court has the authority to grant a post-confirmation permanent injunction for the benefit of non-debtor third parties although it has discussed preliminary injunction issues relating to bankruptcies. *See In re Richard Potasky Jeweler, Inc.* (*Greenblatt v. Richard Potasky Jeweler, Inc.*), 222 B.R. 816, 824 n.14 (S.D. Ohio 1998).

The underlying reason for the differing views among the circuits stems from the interpretation of §§ 524(e) and 105(a). Some courts have ruled that § 524(e) has a preclusive effect over the bankruptcy court's broad equitable powers found in § 105(a). Section 524(e) states that the discharge of the debtor's debt does not affect the liability of any other entity for such debt. On its face, § 524(e) does not set forth a per se rule prohibiting permanent injunctions as to non-debtors. *In re Potasky Jeweler,* 222 B.R. at 824. However, some courts have ruled that § 524(e) prohibits permanent injunctions as to non-debtors, referencing § 524(e)'s predecessors, §§ 16 and 22(b) of the Bankruptcy Act of 1898, which included mandatory language prohibiting the release of certain parties. *In re American Hardwoods, Inc.*, 885 F.2d at 625. The current language found in § 524(e) contains no explicit reference to third party non-debtors. *In re Potasky Jeweler*, 222 B.R. at 825. The conclusion by some courts is that the interplay between § 105 and § 524(e) barring third party injunctions is unwarranted, based on the plain language of both statutes. *Id.* When interpreting the provisions of the Code, a court should be guided by the plain meaning of the statute. *See Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. Partnership*, 507 U.S. 380, 387-89 (1993). When the plain meaning of a statute is clear, the court's inquiry is at an end. *United States v. Ron Pair Enter. Inc.*, 489 U.S. 235, 240-42 (1989). A court should interpret the Code in a manner that avoids a conflict between its various sections. *Id.* at 245-47. Based on the current language of § 524(e), since it does not expressly prohibit third-party injunctions and given that Congress decided to exclude the mandatory language found in the predecessor of § 524(e) which expressly prohibited the release of certain parties, § 524(e) is not a source of authority prohibiting third-party injunctions.

D. Equitable Power/11 U.S.C. § 105(a)

The bankruptcy court's equitable powers are derived from 11 U.S.C. § 105(a) which provides, "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." The plain meaning of § 105(a) authorizes the bankruptcy court to enter only orders that are necessary to carry out the other provisions of the Code. *Wasserman v. Immormino* (*In re Granger Garage, Inc.*), 921 F.2d 74, 77 (6th Cir. 1990). "Whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988). Section 105, standing alone, cannot serve as a source of authority for granting a permanent injunction. *In re Potasky*, 222 B.R. at 825. "In the context of chapter 11 proceedings, the key to granting a permanent injunction 'has been whether the injunction requested was necessary or appropriate to carry out the discharge provisions of [§ 1141].'" *Id.* (citing 2 Collier on Bankruptcy ¶ 105.03[2][b][ii], at 105-43 (15th ed. rev. 1996)(internal quotations omitted)).

Section 1141 only allows the discharge of property belonging to the debtor's estate in a plan of reorganization, "after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors..." 11 U.S.C. § 1141(c). Section 1141 is a source of authority for a permanent injunction pursuant to § 105(a), if the injunction has a direct and immediate connection to the property contained in or the administration of the debtor's plan of reorganization. *In re Potasky*, 222 B.R. at 826; *Zale*

Corp., 62 F.3d at 760-61. "To the extent that property is within the bankruptcy court's jurisdiction, section 105 permanent injunctions would seem to [be] 'necessary and appropriate' to ensure the effectiveness of the discharge of section 1141." *In re Potasky*, 222 B.R. at 826(citing 2 Collier on Bankruptcy ¶ 105.03[2][b][ii][A], at 105-45 n.84(15th ed. rev. 1996)).

Section 1123(b)(3) is another source of authority for a bankruptcy court to exercise the equitable powers found in §105(a). *In re Potasky*, 222 B.R. at 826 n.16. Section 1123(b)(3) states that a plan of reorganization may provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate." 11 U.S.C. §1123(b)(3). An injunction must promote what is "necessary and appropriate" to carry out the provisions of § 1123(b)(3)." *In re Potasky,* 222 B.R. at 826 n.16(citing 2 Collier on Bankruptcy ¶105.03[2][b][ii][C], at 105-46 n.90 (15th ed. rev. 1996)).

A third source of authority for a bankruptcy court to exercise equitable power is found in 11 U.S.C. § 1123(b)(6) which allows a plan to "include any other appropriate provision not inconsistent with the applicable provisions of this title." Section 105(a), along with § 1123(b)(6) provide the bankruptcy courts with broad authority to approve plans of reorganization that include provisions affecting creditors' rights to recover against non-debtors, if the provisions are necessary to carry out the plan. *United States v. Energy Resources, Co, Inc.*, 495 U.S. 545, 549 (1990). The Supreme Court also noted that the bankruptcy court had authority under § 1129(a)(11) to assure itself that the reorganization would succeed. *Id.*

E. Unusual Circumstances Test

The Third Circuit noted in *In re Continental Airlines*, that there are cases which involve mass litigation as in *Robins, Manville, or Drexel* in which injunctions have been ordered by the court in the bankruptcy context. These cases are characterized as "unusual circumstances cases." *In re Potasky*, 222 B.R. at 826. The district court in *In re Potasky* noted:

> Those courts holding that under 'unusual circumstances' a bankruptcy court may grant a permanent injunction to relieve third party nondebtors from liability are not at odds with this principle. In the cases adopting the unusual circumstances test, the courts have noted that the following circumstances justified the granting of a permanent injunction:
>
> (1) That the suit against the non-debtor was, in essence, a suit against the debtor or will deplete assets of the estate;
>
> (2) The non-debtor contributed substantial assets to the debtor's estate as part of the debtor's plan of reorganization; and
>
> (3) The injunction is essential to reorganization. Without the injunction the entire reorganization plan would unravel.

Id. Other nonessential factors which show that an injunction against non-debtors provided for by a plan is fair, include: 1) that a substantial majority of the creditors agreed to the injunction, specifically, the impacted class of creditors; 2) the plan for reorganization provided for full payment of the creditor's claims; and 3) the injunction affected only a small percentage of the claimants. *Id.* n.18. The Third Circuit noted the following factors, "[t]he hallmarks of permissible non-consensual releases–fairness, necessity to the reorganization, and specific findings to support these conclusions ..." *In re Continental*, 203 F.3d at 214.

As noted by the district court in *In re Potasky*,

> In those cases where the courts found that unusual circumstances were present, the injunctions served either to marshal assets of the debtor's estate or to channel the claims of creditors to assets of that estate. The existence of these assets, however, depended upon the action of a third party non-debtor. By permanently enjoining suits against these third party non-debtors, the courts created a legal environment that enabled the non-debtor to take the necessary steps which would lead to the creation of assets for the debtor's estate.

222 B.R. at 826-27. Section 524(e) did not preclude those courts from granting an injunction, nor did the granting of the injunction fall outside of the discharge provisions of § 1141 because the courts were dealing with the property of the debtor's estate. *Id.*

F. Bankruptcy Court's December 21, 1999 Opinion

The Bankruptcy Court expressly found that "neither § 524(e) nor § 524(g) precludes a court from granting non-debtor discharges." *Best-Interests Opinion,* 244 B.R. at 740. The Bankruptcy Court concluded that "§§ 8.3 and 8.4 are not inconsistent with the Code even if they apply to creditors who did not accept the Plan." *Id.* However, the Bankruptcy Court found that based on other "non-bankruptcy law," the release and injunction provisions are inappropriate as to non-accepting creditors. *Id.*

The Court agrees with the Bankruptcy Court that the release and injunction provisions are not inconsistent with the Code, even if they apply to creditors who did not accept the Plan. Based on the discussion above, § 524(e) does not limit the Bankruptcy Court's equitable powers under § 105(a) to issue permanent injunctions to non-accepting creditors. 11 U.S.C. §§ 1141(c), 1123(b)(3), 1123(b)(6) and 1129(a)(11) are sources of authority from which the Bankruptcy Court can exercise its equitable powers under § 105(a) to issue permanent injunctions. Based on the above discussion, there is sufficient authority in the Code to justify the court's issuance of an injunction. The Bankruptcy Court went beyond the Bankruptcy Code to find that it had no authority to issue an injunction against those who did not accept the Plan. The Bankruptcy Court cites *Grupo Mexicano de Desarrollo v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), to support its conclusion that based on non-bankruptcy law, the release provision could not apply to those creditors who did not vote in favor of the Plan. A preliminary injunction was issued by the district court in *Grupo Mexicano* enjoining the dissipation

or transfer of the defendant's assets pending adjudication of the plaintiff's claim for the amount on the notes at issue. The Supreme Court found that the injunction was improper based on the "well-established general rule that a judgment establishing the debt was necessary before a court of equity would interfere with the debtor's use of his property." *Id.* at 321. The Supreme Court in its decision found that a district court did not have the authority to issue a preliminary injunction which affected a debtor's property without a judgment establishing the debt, outside of a bankruptcy action. *Id.* The Supreme Court found that equity "is confined within the broad boundaries of traditional equitable relief," but that equity would not permit "a type of relief that has never been available before." *Id.* at 322. Because no judgment had been entered against the defendant to establish the debt, the district court's issuance of the preliminary injunction enjoining defendant from transferring certain assets was beyond its equitable authority.

The Supreme Court noted that in addition to general equitable powers under the Judiciary Act of 1789, a district court had injunctive authority under certain statutes–the statute authorizing issuance of tax injunctions in the *Grupo Mexicano* case. *Id.* at 326. The Bankruptcy Court in this case, as noted above, had various statutory authorities to issue a permanent injunction under the Bankruptcy Code. This Court is cognizant that the Supreme Court has stated that even if consistent with the Code, a bankruptcy court order might be inappropriate if it conflicted with another law that should have been taken into consideration in the exercise of the court's discretion. *Energy Resources,* 495 U.S. at 550. In *Energy Resources*, the Supreme Court discussed a possible conflicting IRS statute, finding that the statute "plainly does not require

us to hold that the orders at issue here, otherwise wholly consistent with a bankruptcy court's authority under the Bankruptcy Code, were nonetheless improvident." *Id.* at 551. The Supreme Court found that the bankruptcy court did not transgress any limitation on its broad power under the Code. *Id.* Here, other than the United States, no party has identified a possible conflicting statute outside the Bankruptcy Code which may limit the Bankruptcy Court's powers under the Code.

The Bankruptcy Court's conclusion that it has no authority to issue a non-consensual permanent injunction of non-debtor parties is reversed. There is sufficient statutory authority under the Bankruptcy Code to issue a permanent injunction in favor of non-debtor parties and the *Grupo Mexicano* case does not prohibit the Bankruptcy Court from issuing such an injunction. As noted above, in addition to § 105, courts have recognized §§ 1141, 1123(b)(3), 1123(b)(6) and 1129(a)(11) as statutory authorities for the Bankruptcy Court to issue injunctions in favor of non-debtor parties based on non-consensual releases.

The Bankruptcy Court's findings of fact support a finding in favor of an injunction and are not clearly erroneous The Bankruptcy Court found that: 1) the Settling Physicians, the Settling Insurers, and the Shareholders will make important contributions to the reorganization; 2) the release and injunction provisions are essential to the reorganization pursuant to the Plan; 3) the release and injunction provisions are essential to the reorganization pursuant to the Plan; 4) a large majority of the creditors impacted by the release and injunction provisions approved the Plan; 5) there is a close connection between the claims of the non-debtors and the

claims against the Debtor; and 6) the Plan provides for the payment of all of the claims affected by the release and injunction provisions of the Plan. These findings support injunctive relief based on statutory authority under the Code and the "unusual circumstance" case criteria. The evidence presented at the confirmation hearing supports the Bankruptcy Court's findings.

There is no dispute that this case "is one of the world's largest mass tort litigations, and the threatened consequences of the thousands of product liability claims arising from its manufacture and sale of silicone breast implants and silicone gel, [is the reason] Dow Corning filed a petition for reorganization ..." *In re Dow Corning (Lindsey I)*, 86 F.3d at 485. "The potential for Dow Corning's being held liable to the nondebtors in claims for contribution and indemnification, or vice versa, suffices to establish a conceivable impact on the estate in bankruptcy. Claims for indemnification and contribution, whether asserted against or by Dow Corning, obviously would affect the size of the estate and the length of time the bankruptcy proceedings will be pending, as well as Dow Corning's ability to resolve its liabilities and proceed with reorganization." *Id.* at 494. Pursuant to the Sixth Circuit's mandate, all the claims against the Shareholders were transferred to this District. To date, there are approximately 14,795 cases filed with this Court against the Shareholders. The cost to defend these number of cases by the Shareholders would have a substantial effect on the insurance policies shared with the Debtor. *Id.* at 494-95. Any indemnification and contribution sought by the Shareholders against the Debtor relating to the manufacture of the breast implants would also substantially affect the Debtor's estate. The bankruptcy action before this Court is an

unusual case. The Bankruptcy Court erred in its conclusion of law that the bankruptcy court has no authority, statutory or otherwise, to issue a non-consensual permanent injunction in favor of nondebtor parties.

G. The Parties' Arguments

1. Proponents' Arguments

The Proponents (the Debtor and the TCC) argue that the December 21, 1999 Opinion is contrary to the plain meaning of the Joint Plan. The Joint Plan states that the release and injunction apply to "all Persons who have held, hold, or may hold Products Liability Claims, whether known or unknown." Amended Joint Plan, § 8.3. There is no ambiguity in the Plan language according to the Proponents, therefore, the Bankruptcy Court's interpretation that the release only applied to "some" persons was wrong. All the parties, understood that the release and injunction provisions were non-consensual. Only the Bankruptcy Court read otherwise. The Amended Joint Disclosure Statement, approved by the Bankruptcy Court, and sent to all claimants with the Joint Plan, made clear that under § 8.3 of the Joint Plan, "the Shareholders [and other Released Parties] ... will be released from any and all Products Liability Claims..." This means that anyone with a Claim relating to a Breast Implant or any of the other Claims being released will not be able to sue any of the Released Parties, including Dow Corning, Dow Chemical, Corning and the Settling Insurers." D.Ct.R. 19, Tab 2 at 89. The Personal Injury Claimants also received a Special Note stating: "The Plan also provides that no further suits for claims based on the manufacture of silicone products may be brought against Dow Corning or its

shareholders–Dow Chemical and Corning Incorporated." Id., Tab 3 at 2.

The Proponents agree with the Bankruptcy Court's ruling that the release and injunction provisions in §§ 8.3 and 8.4 of the Joint Plan "are not inconsistent with the Code." The Proponents point out that the Bankruptcy Court, in addition to its equitable powers in § 105(a), failed to look to § 1123(b)(6) as a source of power for the approval of the Joint Plan's release and injunction provisions. The Proponents claim that the Bankruptcy Court did not follow the Supreme Court's holding in *Energy Resources*. The Supreme Court held that the statutory directives found in §§ 105(a) and 1123(b)(~~6~~) give the Bankruptcy Courts, as courts of equity, broad authority to modify creditor-debtor relationships. 495 U.S. at 549.

The Proponents further argue that the Bankruptcy Court failed to address the Sixth Circuit's views concerning the importance of resolving the Claims against the Shareholders together with the Claims against the Debtor. The Sixth Circuit found that the claims for indemnification and contribution against or by Dow Corning and the overwhelming number of cases asserted against Dow Corning and the Shareholders would have an effect on the size of the bankruptcy estate, the length of time the bankruptcy proceedings will be pending, and the assets in the joint insurance held by Dow Corning and the Shareholders. *In re Dow Corning* (*Lindsey I*), 86 F.3d at 495.

The ~~Pro~~ponents contend that the Bankruptcy Court's finding that the release and injunction provisions are contrary to non-bankruptcy law is in error. In any event, the

Proponents argue that the non-bankruptcy law cited by the Bankruptcy Court supports the Bankruptcy Court's equitable authority to order the full release of all Claims. In *Grupo Mexicano*, the Supreme Court stated that the limitations on the power to award injunctive relief do not apply to a court if a specific statute allows such power. The Bankruptcy Court's power emanates not from the general equitable jurisdiction but from two sections of the Bankruptcy Code, § 1123(b)(6) and § 105(a). The Proponents argue that the release and injunction provision serve the public's interest because the Joint Plan will permit the prompt and efficient resolution of tens of thousands of outstanding Tort Claims, provide for the adjudication and payment of all Claims that are not settled, and allow the Debtor to continue in business.

For the reasons set forth above, the Court finds that the release and injunction provisions are proper in this case.

2. Nevada Claimants

The Nevada Claimants timely filed an appeal from the Bankruptcy Court's November 30, 1999 Confirmation Order. The Nevada Claimants filed briefs taking two positions on the release and injunction issue: 1) that any injunction enjoining tort claimants who enter the Plan's Settlement Facility to release non-debtor third-parties, is not fair and is not the law; and 2) even with the proviso that non-accepting tort claimants can choose to enter the Litigation Facility the third party release is not justified. The Nevada claimants agree with the Bankruptcy Court's December 21, 1999 Best-Interest-of-Creditors Opinion that the release required as a condition to receiving settlement funds does not apply to claimants who did not vote for the plan; the release provision of the Plan is

not part of the Bankruptcy Court's authority in equity; Section 105(a) is not authority for the Bankruptcy Court's injunctive powers; and the injunction provision violates 11 U.S.C. § 524(e).

As discussed above, the Bankruptcy Court does have authority under § 105(a) and various sections of the Bankruptcy Code to issue an injunction in favor of third-party non-debtors, especially in an unusual circumstances case such as exists in this bankruptcy. The Plan provides for claims against the Debtor and the non-debtors to be channeled to the Litigation Facility if the claimants choose not to enter into the Settlement Facility. The release and injunction provisions do not apply to claimants who choose to bring their claims against the Debtor and the non-debtors via the Litigation Facility. Contributions of assets, including insurance proceeds, meet the index of good faith and in this instance justify the release and injunction as to the Shareholders and the Settling Insurers. *Manville*, 837 F.2d at 91.

3. Class 5 Texas Children/Lacy Claimants

The Lacy Appellants in their response state that if the December 21st opinion of the Bankruptcy Court is stricken, the Bankruptcy Court erred in permanently enjoining the children claimants from prosecuting future claims against Dow Chemical, a non-party. The Lacy Appellants agree with the Bankruptcy Court's December 21 Opinion that the release does not apply to claimants who did not vote for the Plan.

Under the Plan, the Shareholders have agreed to fund the Plan in the amount of $2.35 billion (NPV) of their equity. 7/2/99 Tr., pp. 36, 44. The Shareholders agreed to the Joint

Plan even though their equity in Dow Corning would be depleted by as much as $2.35 billion in exchange for the Shareholders' rights to make claims against the insurance policies shared with Dow Corning. 6/28/99 Tr., pp. 158-59; 7/14/99 Tr., pp. 29-30, 94; 7/2/99 Tr., p. 40; 7/14/99 Tr., p. 34.

The record supports the Bankruptcy Court's findings that the Shareholders and the Settling Insurers "will all make important contributions to the reorganization as part of a confirmed Plan" and that the release and injunction provisions "are essential to the reorganization pursuant to this Plan." 11/30/99 Findings of Fact, ¶¶ 21-22. Cases have held that contributions of assets, including insurance proceeds, meet the index of good faith and, in this instance, justify the release and injunction as to the Shareholders and the Settling Insurers, even though claimants did not vote in favor of the Joint Plan. *Manville*, 837 F.2d at 91; *In re Drexel Burnham*, 960 F.2d at 293.

4. Marti Jacobs

Jacobs claims that the third-party releases should only be required of claimants in the Settlement Facility after the Plan is modified by the Plan Proponents. Jacobs agrees with the Bankruptcy Court that, at a minimum, those who voted against the Plan cannot be deemed to have released Dow Chemical. Jacobs argues that the release should be based on whether a claimant opts out of the Settlement Facility.

Modification of a plan may be made by the proponent of a plan or the reorganized debtor at any time before confirmation. 11 U.S.C. § 1127(a) and (b). In this case, the

Joint Plan has been confirmed by the Bankruptcy Court. Unless the Bankruptcy Court's Confirmation Order is reversed by this Court or a court above, the Joint Plan stands as confirmed. The third-party release and injunction provisions cannot be changed as confirmed. For the reasons set forth above, there is sufficient authority under the Code and case law to support releases and injunctions in favor of the Shareholders in this bankruptcy action.

5. Australian Claimants

The Australian Claimants argue that the Debtor's affiliates have made no contributions to the funds or other consideration to the settlement. The Australian Claimants agree with the Bankruptcy Court that §§ 8.3 and 8.4 bind only those claimants who voted in favor of confirmation of the Joint Plan. The Australian Claimants argue that the Plan does not meet the factors set forth in the *Robins* case.

The record below indicates that the Shareholders and the Debtor's affiliates have made significant contributions to fund the Joint Plan. The evidence at the confirmation hearing showed that the funding provided under the Joint Plan was "on a consolidated basis of Dow Corning Corporation and all of its subsidiary companies." 7/14/99 Tr., p. 102. Sections 8.3 and 8.4 bind all claimants whether they voted in favor of or against the confirmation of the Join Plan, as discussed above.

In *In re Robins*, a release and permanent injunction in favor of third-party non-debtors were approved by the bankruptcy court based on the following factors: 1) that the chapter 11 petition was triggered by a mass tort; 2) claimants

alleged that certain third party non-debtors were liable; 3) the release was essential to the reorganization; 4) the plan had overwhelming support from the constituency affected by the release; 5) a capped fund was established to pay tort claims; and, 6) the funds set aside for the tort claimants were to pay the claims in full. *In re Robins*, 880 F.2d at 698-702.

The objecting parties have failed to show that the Bankruptcy Court clearly erred in its findings of fact as to the release and injunction provisions. The Plan in this case meets all the factors set forth in *Robins*. There is no dispute that the Debtor filed the chapter 11 petition based on the thousands of breast implant claims against it. *In re Dow Corning* (*Lindsey I*), 86 F.3d at 185-186. Claimants in this case allege that the Shareholders are also liable to them. The Bankruptcy Court found that there is a close connection between the claims against the third-party non-debtors and the claims against the Debtor. 11/30/99, Findings of Fact, ¶ 24. The Bankruptcy Court also found that the release was essential to the reorganization and that the third-parties made important contributions to the reorganization of the Plan. 11/30/99 Findings of Fact, ¶¶ 21-22. The Bankruptcy Court further found that a large majority of the creditors impacted by the release and injunction provisions approved the Plan. 11/30/99 Findings of Fact, ¶ 23. The Bankruptcy Court determined that the Plan provides for the payment of all of the claims affected by the release and injunction provisions of the Plan. 11/30/99 Findings of Fact, ¶ 25. In its Best-Interest-of-Creditors Opinion, the Bankruptcy Court concluded that based on the evidence presented at the confirmation hearing, the funding of the Litigation Facility was adequate. *Best-Interests Opinion,* 244 B.R. at 730, 731. The testimony of Tommy Jacks, a plaintiff's personal injury lawyer and a member of the Official

Committee of Tort Claimants, was that the $400,000,000.00 net present value funding of the Litigation Facility was adequate to satisfy the non-settling claims in full. 244 B.R. at 730. Mr. Frederick C. Dunbar further testified that, based on a scientific approach in the calculation of whether the Litigation Facility was adequately funded, 7,513 people would choose the Litigation Facility. 244 B.R. at 731. The total nominal legal costs to resolve the breast implant and other claims and the administrative costs resolving these claims would be about $157.6 million, with a net present value of about $83 million. *Id.* Mr. Dunbar concluded that the $400 million net present value funding of the Litigation Facility is almost five times that necessary to satisfy all the claims channeled to the Litigation Facility. *Id.* The Bankruptcy Court found that even the witness called by the objecting claimants, Mr. John C. Thornton, corroborated Mr. Dunbar's conclusions. *Id.*

6. Helene D. Schroeder

Ms. Schroeder, a claimant with a silicone gel chin implant, objects to the release as it applies to any claims against the attorneys representing the Tort Claimants' Committee. Schroeder agrees with the Bankruptcy Court's December 21, 1999 Opinion limiting the release to those who voted in favor of the Plan. Schroeder claims that a Bankruptcy Court has no jurisdiction to alter the rights of creditors to collect debts from third parties and that the bankruptcy court only has jurisdiction over the Debtor and its property.

The Bankruptcy Court's December 21, 1999 Opinion did not address the issue of whether the release and injunction

provisions found in §§ 8.3 and 8.4 applied to claims against the attorneys representing the Tort Claimants' Committee. The release provision applicable to the various committees is found in § 8.10 of the Amended Joint Plan which states:

> Upon the Effective Date, the Tort Committee, the Commercial Committee, the Physicians Committee, and each of their respective members, representatives and professionals, and all other professionals retained in the Case pursuant to § 327 of the Bankruptcy Code shall be deemed released from all claims and causes of action relating to the bankruptcy estate of Dow Corning or that have been or could be asserted by any party in interest in the Case of any Person acting on behalf of such party in interest.

Amended Joint Plan, § 8.10, p. 30.

The bankruptcy court has the power to approve the releases and issue an injunction with respect to the trustee, temporary receivers and creditors' committees for matters in connection with the chapter 11 case. *In re Drexel Burnham Lambert Group, Inc.*, 138 B.R. 723, 753 (Bankr. S.D. N.Y. 1992). Section 1103(c) of the Code grants to official creditors committees broad authority in formulating a plan for reorganization and performing "such other services as are in the interest of those represented." 11 U.S.C. § 1103(c). There is an implication that the Code grants committee representatives fiduciary duty to the committee's constituents. *In re Mesta Mach. Co.*, 67 B.R. 151, 156 (Bankr. W.D. Pa. 1986). The fiduciary duty "extends to the class as a whole,

not to its individual members." *In re Drexel Burnham Lambert Group, Inc.*, 138 B.R. 717, 722 (Bankr. S.D. N.Y. 1992). At the same time, § 1103(c) gives rise to "an implicit grant of limited immunity." *Id.* at 722 (quoting *In re Tucker Freight Lines, Inc.*, 62 B.R. 213, 216 (Bankr. W.D. Mich. 1986)). The qualified immunity "corresponds to, and is intended to further, the Committee's statutory duties and powers." *Pan Am Corp. v. Delta Air Lines, Inc.*, 175 B.R. 438, 514 (S.D.N.Y. 1994). Such immunity applies to conduct within the scope of the authority conferred to the committee either by statute or the bankruptcy court. *Id.* To overcome this immunity, the party alleging breach of fiduciary duty must prove that the committee engaged in willful misconduct or "ultra vires" activity. *Id.*

A claim that the committee members have acted outside the scope of their duties must first be brought to the Bankruptcy Court. Schroeder claims that the Tort Claimants' Committee engaged in willful misconduct because they did not represent the interest of all personal injury claimants. Schroeder argues that the Committee only represented the interest of the breast implant claimants and not the non-breast implant claimants. There is nothing on the record which indicates that the Bankruptcy Court has had an opportunity to review such a claim. In any event, Schroeder has not presented sufficient evidence that the Tort Claimants' Committee engaged in willful misconduct or conducted ultra vires activity.

Inasmuch as Schroeder is claiming that the Bankruptcy Court does not have the authority to approve the release provision pertaining to the Tort Claimants' Committee representatives, this Court has found that the Bankruptcy

Court does have such an authority. Sections 1102 and 1103 authorize the United States trustee to appoint various committees. Any expenses and salaries to committee members are borne by the Debtor. Any claims against the Tort Claimants' Committee may give rise to indemnification or contribution claims by the Committee against the Debtor's estate. The Debtor's assets would then be implicated. Based on the analysis previously made, the Bankruptcy Court has the authority to approve the Joint Plan which contains a release and injunction in favor of the Tort Claimants' Committee under 11 U.S.C. § 105(a) and §§ 1141(a), 1123(b)(3), 1123(b)(6) and 1129.

7. United States

a. Claims against the Debtor

The Government agrees with the Bankruptcy Court's December 21 Opinion rejecting the Joint Plan's release and injunctive provisions as to the United States' Claims under the Medicare Secondary Payer Statute, 42 U.S.C. § 1395y and the Medical Care Recovery Act, 42 U.S.C. § 2651, against non-debtor third parties. The United States argues that 11 U.S.C. §§ 105 and 1123(b)(6) confer no substantive rights at all. The Bankruptcy Court lacks the power to release or enjoin creditor claims against non-debtors and that only creditors consenting to the release and injunction could be bound by the provisions.

The United States claims that *Energy Resources* supports the United States' argument more than the Proponents' arguments. This Court's analysis of the *Energy Resources* case establishes that the Supreme Court recognizes

the bankruptcy court's broad authority to modify creditor-debtor relationships under §§ 105(a), 1123(b)(5) and 1129. *Energy Resources*, 495 U.S. at 549. This Court's reading of *Energy Resources* differs from the United States' reading of the case. In *Energy Resources*, the Supreme Court concluded that the statute cited by the IRS, by its terms, does not protect against the bankruptcy court's authority under the Code to designate where tax payments may come from.

The United States argues that the Supreme Court's decision in *Callaway v. Benton*, 336 U.S. 132 (1949) is on point and favors the affirmance of the December 21 Opinion. In the *Callaway* case, the Supreme Court disapproved the permanent injunction of a suit by a shareholder stating that the bankruptcy statute does not give the bankruptcy court the right to require acceptance by a lessor not in reorganization of an offer for the purchase of its property. 336 U.S. at 136-41. The Court held that third-party claims are beyond the control of the bankruptcy court and cannot be enjoined, even if doing so is "essential" to the Debtor's reorganization. The United States' position that the *Callaway* case is on point is to no avail given that the basis of the Supreme Court's holding that the bankruptcy court lacked the power to permanently enjoin actions against non-debtors has since been changed. At the time, the *Callaway* decision was based on the bankruptcy court's "exclusive and nondelegable control over the administration of an estate in its possession" and "exclusive jurisdiction of the debtor and its property wherever located." 336 U.S. at 142. The Supreme Court noted that, "[t]here can be no question, however, that Congress did not give the bankruptcy court exclusive jurisdiction over all controversies that in some way affect the debtor's estate." *Id.* Since *Callaway*, 28 U.S.C. § 1334(b) has been expanded to give the

bankruptcy courts jurisdiction over cases "arising in or related to cases under title 11." The Sixth Circuit has held that the Congressional intent was "to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate." *In re Dow Corning (Lindsey I)*, 86 F.3d at 489 (citing *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995)). Proceedings "related to" a bankruptcy proceeding include "suits between third parties which have an effect on the bankruptcy estate." 514 U.S. at 308 n.5. "[A] finding of definite liability of [an] estate as a condition precedent to holding an action related to a bankruptcy proceeding" is not required. 86 F.3d at 491. The United States further argues that the Fourth Circuit's *A.H. Robins* decision is wrong and is distinguishable in any event. As to the *Robins* case, the Court finds that it is applicable to this case and the factors have been met, as noted above.

Based on the above discussion, the Bankruptcy Court has jurisdiction over the claims against the third-parties in this case and to issue an injunction in this matter.

b. Settling Insurers

With respect to the Settling Insurers, the United States argues that vacating the Bankruptcy Court's December 21, 1999 Opinion would destroy the United States' statutory rights against the Settling Insurers which were explicitly preserved by the Bankruptcy Court's orders authorizing the settlements between the Debtor and the Settling Insurers. The Approval Orders entered by the Bankruptcy Court contained the following language:

> Notwithstanding any provision of the Settlement Agreement or any other provisions of this Order, nothing in the Settlement Agreement or this Order shall limit any rights of the United States or its agencies against the Insurers, Dow Corning, or the Settlement Funds. Moreover, notwithstanding any provision of the Settlement Agreement or any other provision of this Order, nothing in the Settlement Agreement shall release the Insurers or Dow Corning from any obligations they may have under federal statutes and regulations, including but not limited to obligations that have arisen or may arise under the Medicare Secondary Payer Statute, 42 U.S.C. § 1395y, and its implementing regulations, 42 CFR 411. The United States and its agencies do not consent to the jurisdiction of this Court beyond any waiver of sovereign immunity.

August 11, 1995 Approval Order, ¶ 13A; March 25, 1996 Approval Order, ¶ 11. The United States claims that the December 21, 1999 Opinion, as it stands, preserves its rights against the Settling Insurers as stated in the Approval Orders. Vacating the December 21, 1999 Opinion would destroy the language of the Approval Orders preserving the United States' rights against the Settling Insurers.

The Approval Orders do state that "[n]otwithstanding any provision of the Settlement Agreement or any other provisions of this Order, nothing *in the Settlement Agreement or this Order* shall limit any rights of the United States or its

agencies against the Insurers." August 11, 1995 Approval Order, ¶ 13A; March 25, 1996 Approval Order, ¶ 11 (emphasis added). However, the Approval Orders do not protect the United States' rights from subsequent orders to be entered by the Bankruptcy Court, including the Bankruptcy Court's Confirmation Order or any subsequent orders relating to the merits of the United States' claims. It is noted that the Bankruptcy Court's December 21, 1999 Opinion does not specifically address the issue raised by the United States on the release and injunction issue as it relates to the Settling Insurers. Because the contributions of assets, including insurance proceeds, meet the index of good faith, the release and injunction as to the Settling Insurers is appropriate. *Manville*, 837 F.2d at 91.

The Sixth Circuit noted the importance of the joint insurance held by the Debtor and its Shareholders:

> Dow Corning, Dow Chemical and Corning Incorporated are co-insured under various insurance policies, which together provide over $1 billion in coverage. Dow Corning's interest in the policies is one of the largest assets of its bankruptcy estate. In addition, Dow Corning recently entered into ten new insurance settlements under which the estate will receive, if approved by the bankruptcy court, approximately $350 to $450 million in cash. Most of these settlement involve policies under which Dow Chemical or Corning Incorporated is a co-insured.

> Dow Corning, Dow Chemical, and Corning Incorporated claim that the district court's order, by allowing thousands of claims to proceed separately against Dow Chemical and Corning Incorporated, will diminish the value of this major bankruptcy asset to the extent that settlements, judgment and defense costs incurred by the shareholders will exhaust policy limits otherwise available to Dow Corning, its creditors, and individuals asserting claims in the bankruptcy proceedings. ...

In re Dow Corning Corp. (Lindsey I), 86 F.3d at 494. Any release and injunction must apply not only to the Shareholders but to the Settling Insurers as well. Based on the analysis previously made, the release and injunction provisions apply to the United States' claims against the Settling Insurers, as well as the Shareholders.

8. Pennsylvania Class 5 Claimants

The Pennsylvania Class 5 Claimants argue that based on cases from the Ninth and Tenth Circuit, the non-debtor releases are not sufficient as a matter of law. The cases that have upheld then on-debtor releases show that there was consideration to the debtor. The Pennsylvania Class 5 Claimants object to the releases as they pertain to Settling Physicians and Health Care Providers. The Pennsylvania Class 5 Claimants argue that the release and injunction provisions do not meet the five prongs set forth in the *Robins* case. First, the Pennsylvania Class 5 Claimants' tort claims will not be paid in full because they are required to release all

doctors. Second, there was no overwhelming approval of the Plan because there was no overwhelming support of the Plan by the Pennsylvania Class 5 Claimants. Third, there is no substantial contribution as to the surgeons, doctors and healthcare providers under the Plan. Fourth, the release, as to the physicians and healthcare providers, is not necessary to the Debtor's reorganization. Finally, there is no close connection between the claimants' claims versus the healthcare providers and the Debtor. There is no identity of interest as to the healthcare providers.

In response to the Pennsylvania Class 5 Claimants, the Class 12 Physicians and Class 13 Health Care Providers ("Settling Physicians and Health Care Providers") seek to intervene in the appeals because they claim that no one represents their interests and they are not part of any Committee. They argue that while the Plan seems to "deem" Released Claims as to the Settling Physicians and Settling Health Care Providers as occurring on the Effective Date of the Plan, these claims are in reality not released until a Claimant affirmatively elects to become a "Settling Personal Injury Claimant," and the physician and/or health care provider affirmatively elects to become a "Settling Physician" or "Settling Health Care Provider." This two-tier mechanism provides that the Settling Physicians and Settling Health Care Providers obtain releases and injunctions that are expressly, inherently consensual, unlike the releases afforded to the Debtor-Affiliated and Shareholder-Affiliated Parties. The Settling Physicians and Health Care Providers argue that the December 21, 1999 Opinion, if it applies, only applies to those non-consensual releases/injunctions affecting the Debtor-Affiliated and Shareholder-Affiliated Parties, but not to Settling Physicians or Settling Health Care Providers. The

Plan provides no election process to a Claimant prior to releasing claims against the Debtor-Affiliated and Shareholder Affiliated Parties, whereas, a Claimant must first elect to become a "Settling Personal Injury Claimant" and the physician/healthcare provider affirmatively elects to become a "Settling Physician" or "Settling Health Care Provider." The Class 12 Physicians and Class 13 Healthcare Providers seek a ruling that the December 21, 1999 Opinion does not apply to their situation because the release and injunction provisions as they apply to the Settling Physicians and Healthcare Providers are consensual in nature because of the two-tier election mechanism under the Plan.

The Court notes that the December 21, 1999 Opinion states that other released parties under §§ 8.3 and 8.4 "include ... health-care providers in Classes 12 and 13 *who settle their respective claims against the Debtor.*" *Best-Interests Opinion,* 244 B.R. at 736 (emphasis added). The Proponents of the Plan do not address this issue in their briefs. The Court will consider the Class 12 Physicians and Class 13 Healthcare's Motion to Intervene as Motion to file an Amicus Curiae brief given that this matter is on appeal from the Bankruptcy Court and intervention is not procedurally proper on appeal as noted above.

Specifically, as it relates to the Class 12 Physicians and Class 13 Healthcare Providers, § 8.3 states:

> Except as otherwise expressly provided in this Plan and in this section 8.3, in consideration of ... (d) *the release of Claims against the Debtor-Affiliated Parties by the Settling Physicians and Settling Health Care Providers,*

> on the Effective Date ... (ii) all Persons who hold or may have held Personal Injury Claims shall be deemed to have forever waived and released all such rights or Claims, whether based upon tort or contract or otherwise, that they heretofore, now or hereafter possess or may possess against the Settling Physicians (except for Malpractice Claims) or the Settling Health Care Providers (except for Malpractice Claims) ...
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> * * *
>
> This section 8.3 shall not operate as a release or waiver of any Malpractice Claim held against a Settling Physician or a Settling Health Care Provider by a Settling Personal Injury Claimant. Malpractice Claims, if any, asserted by Settling Personal Injury Claimants shall be resolved in the courts where actions based on such Claims have been (or may be) filed. Moreover, this section 8.3 shall not operate as a release or waiver in favor of the Settling Physicians and the Settling Health Care Providers of the rights or Claims of Non-Settling Personal Injury Claimants. Such rights and Claims shall be preserved, subject to section 8.5 of this Plan. This Section 8.3 shall not operate as a release or waiver of those Claims preserved under the Domestic Health Insurer Settlement Agreement.

§ 8.3, Amended Joint Plan (emphasis added). Section 8.5 of

the Amended Joint Plan provides for the channeling of the claims by "*Non-Settling Personal Injury Claimants against the Settling Physicians and the Settling Health Care Providers (other than Malpractice Claims).*" "Non-Settling Personal Injury Claimants" are "those Personal Injury Claimants (other than Claimants in Classes 6A, 6B, 6C and 6D) who are not Settling Personal Injury Claimants." § 1.110, Amended Joint Plan. "Settling Personal Injury Claimants" are those "Personal Injury Claimants (other than Claimants in Classes 6A, 6B, 6C and 6D) who elect to settle their Claims under the terms of the Settlement Facility, together with those Personal Injury Claimants who do not timely return an Election Form." § 1.161, Amended Joint Plan. "Settling Health Care Providers" are those "who timely elect to settle their Claims against the Debtor" and "Settling Physicians" are those "who timely elect to settle their Claims against the Debtor." §§ 1.159 and 1.162, Amended Joint Plan of Reorganization.

Based on the express language of the Plan, it is clear that any "release" of claims against the Physicians and the Healthcare Providers do not include malpractice claims. Section 8.3 clearly states that malpractice claims against the Physicians and Healthcare Providers are not deemed released under the Plan. Additionally, § 8.3 provides that in order for § 8.3 to apply, the Physicians and Healthcare Providers must first become "Settling Physicians" and "Settling Health Care Providers." In order to do that, the Settling Physicians and Settling Health Care Providers must "release" their "Claims" against the Debtor and its affiliates by timely electing to settle their Claims against the Debtor and its affiliates. §§ 8.3(d), 1.159 and 1.162, Amended Joint Plan.

Section 8.3 does not automatically release the Physicians and Healthcare Providers. A Personal Injury Claimant must first elect to settle her Claims against the Debtor. A Physician and/or Healthcare Provider must also elect to settle their Claims against the Debtor. Otherwise, § 8.3 does not apply. The consideration under § 8.3 as it applies to the Physicians and Healthcare Providers is that they must release their Claims against the Debtor in order for § 8.3 to apply to the Claims by the Personal Injury Claimants against the Physicians and Healthcare Providers. As argued by the Class 12 Physicians and Class 13 Healthcare Providers, in order for the release provision to apply, a two-step process is involved: the Personal Injury Claimant must elect to settle his/her Claims against the Debtor and the Class 12 Physicians and the Class 13 Healthcare Providers must also elect to his/her Claims against the Debtor. If the Personal Injury Claimant chooses not to settle his/her Claims with the Debtor, then those Claims are dealt with pursuant to the Litigation Facility Agreement. If the Physicians or Healthcare Providers choose not to settle their Claims against the Debtor, then, even if the Personal Injury Claimants elect to settle their Claims with the Debtor, the Claims against the Physicians or Healthcare Providers are resolved in the Litigation Facility. If the Personal Injury Claimants do not elect to settle their Claims with the Debtor, but the Physicians or Healthcare Providers elect to settle their Claims against the Debtor, then the Claims against the Physicians or Healthcare Providers are not deemed released but are channeled to the Litigation Facility under § 8.5.

The Court finds that the Release provision only applies to Personal Injury Claimants and Physicians and/or Healthcare Providers when both elect to become settling

parties. A voluntary and consensual release is not a discharge in bankruptcy and does not run afoul with the Bankruptcy Code. *See In re Arrowmill*, 211 B.R. at 506. If the Personal Injury Claimants elect to settle their claims against the Debtor, their Claims would be paid in full because any malpractice claims against the Physicians and/or Healthcare Providers, whether they have elected to settle or not, are not deemed released under § 8.3. Any Personal Injury Claimant is allowed to pursue malpractice claims against a physician where the cause of action was or is to be filed based on the express language of § 8.3.

Although the Pennsylvania Class 5 Claimants argue that *within* the Pennsylvania Class 5 Claimants, there was no overwhelming approval of the Plan, the Bankruptcy Court's finding that "a large majority of the creditors impacted by the release and injunction provisions approved the Plan" is supported by the record and is not a clearly erroneous finding. The Bankruptcy Court's finding that the "important contributions to the reorganization" are made by the Settling Physicians is also supported by the record. The Settling Physicians and the Settling Healthcare Providers release of their Claims against the Debtor, if they so elect, is an important contribution and consideration to the reorganization. Any release by the Settling Physicians and the Settling Healthcare Providers would contribute to the Estate of the Debtor. The Bankruptcy Court's finding that the Release, as to the Physicians and Healthcare Providers, are "essential" to the reorganization of the Plan is not clearly erroneous and is supported by the record. The Bankruptcy Court's finding that there is a "close connection" between the claims of the Physicians and the Healthcare Providers on the one hand and the claims against the Debtor on the other hand

is also supported by the record and is not clearly erroneous. The Claims by the Physicians and the Healthcare Providers against the Debtor involve the Debtor's misrepresentations about the breast implants and/or raw materials in its marketing to the Physicians and Healthcare Providers. The Claims by the Personal Injury Claimants against the Debtor involve its misrepresentations and the manufacture of the breast implants and/or raw materials to the claimants. The Claims are closely connected. The Release provision, as it applies to the Class 5 Pennsylvania Claimants and the Settling Physicians and Settling Healthcare Providers, also meets the best-interests-of-creditors test.

9. Settling Insurers

Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies ("London Market Insurers"), join in the arguments of the Proponents and the Hartford Insurers. The Bankruptcy Court entered an order approving the settlement between the Debtor and the London Market Insurers. The London Market Insurers claim that the releases contained in the Joint Plan were a key element of the consideration that the London Market Insurers received in exchange for their settlement payments to the Debtor. The London Market Insurers contend that if the December 21 Opinion stands, it would be an impermissible modification of the London Market Insurers' settlement and the settlement would be a nullity. The insurance issue was hotly contested in the Wayne County Circuit Court, State of Michigan. After lengthy hearings before the Bankruptcy Court, the settlement was approved between the London Market Insurers and the Debtors. The effectiveness of the settlement was expressly conditioned upon the entry of an approval order containing

releases of the London Market Insurers effective against non-parties to the bankruptcy case. The money provided by the London Market Insurers and the other Settling Insurers has formed the bedrock of the Plan of Reorganization. Any modification of the settlement by the December 21, 1999 Opinion should be vacated.

On August 11, 1995, the Bankruptcy Court entered an order approving a compromise between the Debtor and Hartford Accident and Indemnity Company, Hartford Fire Insurance Company, Nutmeg Insurance Company, First State Insurance Company, First State Underwriters of New England Reinsurance Corp. and Twin City Fire Insurance Company (the "Hartford Insurers"). The Hartford Insurers also join in and incorporate by reference the arguments made by the Proponents and the London Market Insurers. The Hartford Insurers argue that they have been previously released by the Approval Order of the Bankruptcy Court. The releases granted to the Hartford Insurers were the key consideration received by the Hartford Insurers in exchange for $107,500,000.00 paid to the Debtor. To the extent that the December 21, 1999 Opinion is interpreted to modify the releases previously granted to the Hartford Insurers, such a purported modification is a nullity because the Bankruptcy Court lacked jurisdiction to modify a previously approved settlement agreement. *Mallory v. Eyrich*, 922 F.2d 1273, 1279 (6th Cir. 1991)(a district court possesses no discretion to alter the terms of a settlement agreement).

The Approval Orders and various Settlement Agreements between the Debtor and the Settling Insurers apply because the Release provision specifically addresses

those Settlement Agreements between the Settling Insurers and the Debtor. In particular, § 8.3 state:

> Except as otherwise expressly provided in this Plan in this section 8.3, in consideration of ... (c) the undertakings of the Settling Insurers *pursuant to their respective settlements with the Debtor*, ... (i) all Persons who have held, hold, or may hold Products Liability Claims, whether known or unknown, shall be deemed to have forever waived and release all such rights or Claims, whether based upon tort or contract or otherwise, that they heretofore, now or hereafter possess or may possess against ... the Settling Insurers.

§ 8.3, Amended Joint Plan. The Settling Insurers and the Debtor have voluntarily agreed to the releases, with the approval of the Bankruptcy Court. Voluntary and consensual releases are not a discharge in bankruptcy and do not run afoul with the Bankruptcy Code. *See In re Arrowmill*, 211 B.R. at 506. Additionally, for the reasons set forth previously, the release and injunction provisions apply to the Settling Insurers.

H. *In re: Telectronics* Case

The Nevada Claimants and the Class 5 Texas Children Claimants filed supplemental briefs calling the Court's attention to the Sixth Circuit's recent decision in *In re Telectronics Pacing Systems, Inc.*, Nos. 99-3476 to 99-3480, 2000 WL 995161 (6th Cir. July 19, 2000). Specifically, the

Claimants argue that this Court should find that the Shareholders in this case should not be released based on the Sixth Circuit's ruling in *In re Telectronics* that in a limited fund class action settlement, a parent corporation should not be released as part of the settlement because the class members would have no recourse against the parent companies. The Proponents filed a response to the Nevada and Class 5 Texas Children Claimants' supplemental briefs arguing that the Sixth Circuit's reasoning in *In re Telectronics* on the release issue does not apply in this bankruptcy action where the bankruptcy plan in this case was overwhelmingly approved by the creditors and all claimants will be paid in full under the plan.

In re Telectronics, a multi-district litigation proceeding in the Southern District of Ohio, involved a products liability class-action litigation brought on behalf of individuals implanted with the Telectronics Accufix Atrial "J" pacemaker lead. *In re Telectronics*, 2000 WL 995161, at *3. Defendant TPLC manufactured and distributed the leads in the United States between 1988 and 1994. *Id.* Defendant Telectronics Pacing Systems, a holding company, is the sole owner of Defendant TPLC. *Id.* Defendant Nucleus, Ltd., a holding company and an Australian company, owned Defendants TPLC and Telectronics Pacing Systems. *Id.* Defendant Pacific Dunlop, Ltd., also an Australian company, purchased Nucleus in 1988 becoming the beneficial owner of Defendants TPLC and Telectronics Pacing Systems. *Id.* Defendants Nucleus and Pacific Dunlop were alleged to be liable to the plaintiffs on the ground that they are alter egos or agents of their subsidiaries, Defendants TPLC and Telectronics Pacing Systems. *Id.*

Fed.R.Civ.P. 23(b)(1)(B) is used in a class action proceeding in cases where there is only a "limited fund" from which claims are aggregated against. *Id.* at *5. The district court, after a fairness hearing required by Fed.R.Civ.P. 23(e), approved the settlement and certified the class as a mandatory, non-opt-out class under Fed.R.Civ.P. 23(b)(1)(B). *Id.* at *4. The district court certified the non-opt-out class because it found that there was a "limited fund" from which the injured plaintiffs could be paid. In finding a "limited fund," the district court only determined the assets of the subsidiary, TPLC, and not the assets of Nucleus or Pacific Dunlop, its parent companies. *Id.*

The district court found that the assets of the Australian companies should not be included in determining the total assets available to the settlement fund because: 1) it believed that the court was unlikely to obtain jurisdiction over the Australian companies; 2) the time and costs of litigation against a foreign defendant made litigation infeasible; and 3) the jury in the summary trial had not found the two Australian companies liable. *Id.*

The district court determined the assets of TPLC to be about $78 million, which were divided into four funds, including a $47 million Patient Benefit Fund to compensate the class action members, an Operating Fund of $20 million, a $7 million Litigation Fund to go toward non-lead-related litigation, and a Reserve Fund of $4 million to pay expenses in other unrelated litigation. *Id.* Pacific Dunlop agreed to contribute an additional $10 million to the Patient Benefit Fund, raising that fund to $57 million. *Id.* As part of the Rule 23(b)(1)(B) class action settlement, the Australian parent companies were released from liability. *Id.* at * 7. Several

objectors filed appeals from the district court's approval of the settlement.

On appeal, the Sixth Circuit applied the Supreme Court's decision in *Ortiz v. Fibreboard Corp.*, 119 S.Ct. 2295 (1999). In the *Ortiz* case, the Supreme Court held that one of the characteristics of a Rule 23(b)(1)(B) "limited fund" class action settlement is that, "the totals of the aggregated liquidated claims and the fund available for satisfying them, set definitely at their maximums, demonstrate the inadequacy of the fund to pay all the claims." 119 S.Ct. at 2311. In *In re Telectronics*, there was no dispute that TPLC, standing alone, did not have the necessary assets to cover the expected liability. *In re Telectronics,* 2000 WL 995161, at * 7. The objectors argued that the case was not a true "limited fund" case because the assets of the Australian parent companies were not included. They further argued that the Australian parent companies' assets should not be excluded from the calculation of the "fund available" under Rule 23(b)(1)(B) because they were solvent companies and could be potentially liable. *Id.*

The Sixth Circuit reversed the approval of the class action settlement under Fed.R.Civ.P. 23(b)(1)(B) because it found that the district court's finding that there were limited assets available to the defendants to fund the class action payments was not supported by the record. The two Australian companies appear not to have limited funds and are able to bear the expense of litigation and pay damages. *Id.* Because the district court believed that TPLC would not settle without the release of the two parent companies, the district court approved the settlement. *Id.* The district court concluded that the loss of the settlement constituted a "risk"

within the meaning of Rule 23(b)(1)(B) sufficient to allow the settlement to go forward. *Id.* The Sixth Circuit found that the "risk" of losing the settlement was not sufficient to support a finding that the fund was limited because risk is always inherent in litigation. *Id.* at *9. The Sixth Circuit also found that the district court's finding that it may not be able to exercise personal jurisdiction over the Australian companies conflicted with the district court's earlier finding in its order denying the motion to dismiss the Australian defendants for lack of personal jurisdiction. In that opinion, the district court found that the Australian companies exercised a great deal of control over TPLC, including monthly reviews of the subsidiaries' reports and providing strategic planning and advice to the subsidiaries. *Id.* at *7. The Sixth Circuit concluded that the district court confused the ability of plaintiffs to prevail on the merits against the Australian companies with the ability to pay a judgment, which are two separate issues. *Id.* at *8. But for the settlement, the Sixth Circuit found that there would be no limited fund because the class members could pursue their claims against the Australian companies, along with TPLC. *Id.* at *8. The Sixth Circuit then noted that it could not approve a settlement release of parent companies from all liability because it would leave class members with no recourse against the parent companies. *Id.* at *8.

The scenario before the Sixth Circuit in the *In re Telectronics* case substantially differs from the case before this Court. The *Telectronics* case is a Rule 23(b)(1)(B) limited fund class settlement case. The instant case is a bankruptcy action. The Sixth Circuit in *In re Telectronics* clearly distinguished the case before it from a bankruptcy action by noting that this country has a comprehensive

bankruptcy scheme and bankruptcy requires vigorous examination of various expenses. *Id.* at *9. The Sixth Circuit noted that a large mass tort action or other litigation will put a company into bankruptcy but that a district court's discharge of a parent company's debt in advance of bankruptcy would usurp the bankruptcy scheme through settlement. *Id.* The Sixth Circuit did not make a blanket rule that the release of a parent company was improper in all cases, including in a bankruptcy action. The Sixth Circuit found that the release was improper in *In re Telectronics* because in a class action suit, unless there are sufficient facts to show that there are limited funds from the assets of "all" defendants, a Rule 23(b)(1)(B) class action settlement is improper. The Sixth Circuit found that the district court did not make sufficient findings as to the parent companies' assets, including the court's failure to undertake an independent risk analysis on whether the insurance policy coverage was sufficient. *Id.* at *8. The Sixth Circuit further found that because it appeared that the parent companies may have sufficient assets to pay the cost of litigation and compensate any injuries and that the district court may be able to exercise personal jurisdiction over the parent companies, the district court's finding that there was a "limited fund" from which the class action members could be paid from was not supported by the record. *Id.* at *8. The Sixth Circuit's main concern was that the class members had no recourse, at all, against the parent companies, who may have sufficient assets to pay any damages, if the parent companies were released under the settlement agreement. Here, the claimants under the Amended Joint Plan will only release the Shareholders if they choose to settle their claims with the Settlement Facility. The claimants in this bankruptcy action have a recourse against the Shareholders should they choose to litigate their claims in the

Litigation Facility. Any claims litigated in the Litigation Facility would be paid in full. The evidence before the bankruptcy court shows that the cap imposed on the Litigation Facility is more than sufficient to cover any successful claims against the Litigation Facility. The Sixth Circuit's due process concerns regarding the parent companies in *In re Telectronics* are not present under the Amended Joint Plan. The Sixth Circuit's decision in *In re Telectronics* does not apply to the bankruptcy action before this Court.

I. Conclusion re Release and Injunction Provisions

Reviewing *de novo* the Bankruptcy Court's legal conclusion expressed in its December 21, 1999 Opinion that it had no jurisdiction to issue an injunction, for the reasons set forth above, the Court finds that the Bankruptcy Court erred in its conclusion. However, under a clearly erroneous standard, the Bankruptcy Court did not clearly err in its findings of fact regarding the release and injunction provisions in its November 30, 1999 Findings of Fact and Conclusions of Law because the findings were supported by the record before the Bankruptcy Court. The Court reverses the Bankruptcy Court's legal conclusion regarding the release and injunction provisions expressed in its December 21, 1999 Opinion, for the reasons set forth above. The Court affirms the Findings of Fact and Conclusions of Law and the Bankruptcy Court's November 30, 1999 Confirmation Order.

VIII. CLASSIFICATION, TREATMENT, FAIRNESS AND BEST INTERESTS

A. Background

Various parties have filed appeals from the Bankruptcy Court's Confirmatio Order and Amended Opinions on the classification and treatment of claims, the fairness of the Amended Joint Plan and whether the Amended Joint Plan is in the best interests of creditors. There are 33 classes and subclasses under the Amended Joint Plan.[6] The appeals before this Court, based on classification, good faith, treatment, and the best-interests-of-creditor test, involve the following classes: Class 5 Domestic Breast Implant Claims; Class 6.1 Foreign Breast Implant Claims; Class 6.2 Foreign Breast Implant Claims; Class 9 Domestic Other Products Personal Injury Claims; Class 12 Physician Claims; and Class 15 Government Payor Claims. Many arguments presented by the parties are the same for each issue. The Court will generally address the applicable law as to each issue and then address each parties' arguments in the following order: the Domestic Claimants, the Foreign Claimants, the Class 9 Domestic Other Products Claimants, the Class 12 Physician Claimants, and the Class 15 United States' Claims.

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[6] All of the classes are delineated in the Bankruptcy Court's December 2, 1999 *Amended Opinion on the Classification and Treatment of Claims*, 244 B.R. at 641 n.1. *See Amended Joint Plan of Reorganization*, Art. 3.

B. Standard

1. Classification/11 U.S.C. § 1122(a)

11 U.S.C. § 1122(a) provides that "a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class." "Substantially similar" has been defined as "similar in legal nature, character or effect." *In re Dow Corning Corp. (Classification and Treatment Op.)*, 244 B.R. at 644. The claims need not be identical. *Id.* at 655; 7 Collier on Bankruptcy ¶ 1122.03[3][a]. There is no requirement that claims be classified according to their values. *In re Resorts Int'l, Inc.*, 145 B.R. 412, 448 (Bankr. D.N.J. 1990). Although § 1122(a) speaks only to the types of claims that can be classified together, the Sixth Circuit has held that substantially similar claims may be classified separately unless the classification is used to line up votes in favor of the plan, or if a shareholder and creditors who are not intimately connected with the enterprise are placed together, or where a breach of fiduciary obligation or unfair dealings are at issue. *In re U.S. Truck Co.*, 800 F.2d 581, 586-88 (6th Cir. 1986). The bankruptcy court has "broad discretion to determine proper classification according to the factual circumstances of each individual case." *Id.* at 586.

The Bankruptcy Court extensively analyzed the current state of the law on the classification issue stating that the Sixth Circuit has adopted a "legitimate reason" standard as to whether classification is proper. *Classification and Treatment Op.*, 244 B.R. at 645 (citing *Aetna Cas. & Surety Co. v. Clerk (In re Chateaugay Corp.)*, 89 F.3d 942, 949 (2d Cir. 1996)); *In re Stratford Assocs. Ltd. Partnership*, 145 B.R.

689, 696 (Bankr. D. Kan. 1992); and *In re Barakat*, 99 F.3d 1520, 1526 (9th Cir. 1996). The Bankruptcy Court believes that this standard is wrong as a matter of law but is bound by the Sixth Circuit precedent in *U.S. Truck. Classification and Treatment Op.*, 244 B.R. at 651. The Bankruptcy Court suggests that the standard to be applied, based on the plain language of 11 U.S.C. § 1122(a), is to ascertain only whether the claims within that class are substantially similar in character to each other. *Id.* Section 1122(a) should not be viewed as prohibiting a plan proponent from placing substantially similar claims in different classes regardless of whether it has proven a "legitimate reason" for doing so. *Id.* at 650. Concerns as to whether a proposed plan is abusive of the bankruptcy process and whether the plan does not unfairly discriminate against and is fair and equitable to any class that rejects it are addressed through the good faith requirement under § 1129(a)(3), other provisions in § 1129(a), and the cram down provision in § 1129(b). *Id.* at 650-51.

Based on the statutory language found in both §§ 1122(a) and 1129, the Court agrees with the Bankruptcy Court's analysis that the only inquiry a bankruptcy court is required to make, under § 1122(a), is whether the claims within a class are substantially similar. If the claims are found to be substantially similar and objections are made as to whether the plan proponent submitted a plan in good faith–specifically that the classifications were made to gerrymander votes or in violation of fiduciary obligations, the inquiry should be made under § 1129(a)(3). If the claims are not found to be substantially similar then the plan cannot be confirmed. A plan proponent would still be required to submit proof, perhaps not as extensive as required by the "legitimate reason" standard, as to whether the claims are substantially

similar, especially if objections are made that the claims in a class are not substantially similar.

This Court's reading of *U.S. Truck* does not necessarily contradict the Bankruptcy Court's analysis. The Sixth Circuit did not expressly hold that the plan proponent was required to show a "legitimate reason" as to why similar claims were classified separately. It appears that the Sixth Circuit's main concern was that the classification of claims was not to be used to gerrymander votes or that unfair dealing and breach of fiduciary obligations occurred in the classification of claims. *In re U.S. Truck,* 800 F.2d at 586-87. The Bankruptcy Court's analysis does not contradict the Sixth Circuit's concern in *U.S. Truck* that potential abuse could occur if there were not some limit on the plan proponent's power to classify claims. The Sixth Circuit acknowledged the less restrictive language used by Congress in § 1122 but questioned whether Congress intended the plan proponent to have such broad power over classification. *Id.* at 586. If similar claims are placed in separate classes, the only restriction *U.S. Truck* places on the debtor's broad power to classify claims is that the similar claims not be classified separately in order to obtain votes. *Id.*

The first case cited by the Sixth Circuit in *U.S. Truck*, *First Nat'l Bank of Herkimer v. Poland Union*, 109 F.2d 54 (2d Cir. 1940), dealt with a class which contained shareholders and other creditors who were not so intimately connected with the enterprise. This classification guaranteed a vote in favor of the plan because the shareholders stood to profit from the plan. The second case cited was *American United Mut. Life Ins. Co. v. City of Avon Park*, 311 U.S. 138 (1940). The plan in *American United* was not confirmed

because it was not clear whether the agent soliciting the votes for the plan in the same class disclosed his interest in the plan. The agent administering the plan also held claims on which he would enjoy profit if the plan was confirmed. The Sixth Circuit in *U.S. Truck* approved the analysis of these two cases in affirming the district court's finding that the "interests" of the Teamsters Committee "differed substantially" from the other creditors who were placed in a different class. *U.S. Truck*, 800 F.2d at 587. The Teamsters Committee objected to the plan because the Teamsters Committee believed its claims based on the collective bargaining agreement, which were placed in a separate class, should be classified in the same class with the secured claims.

In *U.S. Truck*, the real issue was whether the Teamsters Committee's claim and the secured claims were properly classified separately based on the substantial similar standard under § 1129(a). Although the Sixth Circuit noted that there should be some restrictions on the debtor's power to place similar claims in separate classes, such as gerrymandering of votes, that issue was not before the court because the debtor admitted to the district court that it separated the classes in order to line up the votes in favor of the plan. *U.S. Truck*, 800 F.2d at 586 n.8. Even with this admission, the Sixth Circuit did not reject the confirmation of the plan because it agreed with the district court that the claims were properly separately classified because the "interest" of the claimants were *not* substantially similar. *Id.* at 587.

Based on *U.S. Truck,* it appears that the inquiry regarding classification is whether the claims are substantially similar, as the Bankruptcy Court suggests the plain language

of the statute provides. If similar claims are placed in separate classes the classes are properly constituted. Any good faith issues are resolved under § 1129(a)(3). The Sixth Circuit's opinion also notes that, by allowing similar claims to be classified in separate classes, a particular class "is still protected by the provisions of subsections (a) and (b), particularly the requirements of subsection (b) that the plan not discriminate unfairly and that it be fair and equitable." *Id.* at 587.

Because the Bankruptcy Court has applied the higher "legitimate reason" standard to the parties' objections, this Court's inquiry will be whether the Bankruptcy Court's finding as to the classifications issue was clearly erroneous, based on the Bankruptcy Court's application of the "legitimate reason" standard even though *U.S. Truck* does not expressly hold that the "legitimate reason" standard is adopted in the Sixth Circuit.

2. Within Class Treatment/11 U.S.C. § 1123(a)(4)

Section 1123(a)(4) applies to the treatment of claims within the same class. A plan is required to "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest." 11 U.S.C. § 1123(a)(4). Section 1123(a)(4) "is not to be interpreted as requiring precise equality of treatment, but rather, some approximate measure [of equality]." *In re Resorts*, 145 B.R. at 447. The appropriateness of whether a plan provides different treatment to claims which are

legitimately classified in separate classes arises, if at all, only in the context of cram down under 11 U.S.C. § 1129(b).

The Bankruptcy Court rejected the reasoning found in *In re AOV* regarding within-class treatment under § 1123(a)(4). In *In re AOV*, the D.C. Circuit stated that inequality under §1123(a)(4) includes a situation where there is payment of different percentage settlements to co-class members and that the "other side of the coin" is where there is unequal consideration tendered for the equal payment. *In re AOV*, 792 F.2d at 1152. Under the plan in *AOV*, the class at issue included all general unsecured creditors. *Id.* at 1150. The objecting party in the class possessed a direct claim against certain third parties whereas the remaining class members possessed only derivative claims against third parties. *Id.* at 1151. The D.C. Circuit held that because the party that had a direct claim gave up more consideration than the parties with only derivative claims under the settlement offer, the party with the direct claim was treated unequally. *Id.* at 1152-53.

This Court agrees with the Bankruptcy Court's conclusion that the reasoning in *In re AOV* regarding equal treatment within a class should be rejected. The claims at issue in this case involve disputed and unliquidated claims. In the *In re AOV* case, the claims were undisputed and liquidated. Requiring a bankruptcy court to inquire as to the amount of consideration involved in each claim involving a disputed and unliquidated personal injury claim, especially in a mass tort situation, would be an unrealistic, unworkable and an unduly burdensome position for the bankruptcy court to be in. Settlement negotiations would not be effective under such a standard and the bankruptcy court would be placed in a

situation where it would become involved in the negotiation process. The *In re AOV* case also failed to consider the second half of the language found in § 1123(a)(4) which expressly allows for disparate treatment of a claim if the claimant "agrees to a less favorable treatment." 11 U.S.C. § 1123(a)(4). Agreeing to settle, instead of litigating a claim, would permit a claimant to be treated differently, such as giving up more valuable consideration, in exchange for the settlement offer. This treatment is allowed under § 1123(a)(4). The primary treatment under the Amended Joint Plan is the same for each tort claimant–to enter the Litigation Facility. The secondary treatment is to accept the settlement offer of the Settlement Facility. Based on the express language of § 1123(a)(4), under a *de novo* review, the Bankruptcy Court did not err in holding that a claimant who elects to settle under the Amended Joint Plan agrees to a less favorable treatment than the litigation option, and that this agreement complies with the second clause of § 1123(a)(4).

3. Good Faith/11 U.S.C. § 1129(a)(3)

A number of Appellants argue that the Plan was not proposed in good faith. 11 U.S.C. § 1129(a)(3) provides:

> (a) The court shall confirm a plan only if all of the following requirements are met:
>
> * * *
>
> (3) The plan has been proposed in good faith and not by any means forbidden by law.

A bankruptcy court's finding that a debtor's plan is proposed in good faith is a finding of fact reviewed under the clearly erroneous standard. *In re Caldwell*, 851 F.2d 852, 858 (6th Cir. 1988). The Sixth Circuit has addressed the good faith requirement relating to confirmation of a plan filed under chapters 12 and 13. The identical statutory language was considered. The Sixth Circuit held that good faith must be reviewed based on the totality of the circumstances. Good faith is defined by factual inquiry. *In re Laguna Assoc. Ltd. Partnership*, 30 F.3d 734, 738 (6th Cir. 1994)(quoting *In re Okoreeh-Baah*, 836 F.2d 1030, 1033 (6th Cir. 1988)). Pre-petition behavior is irrelevant. *Good Faith Opinion,* 244 B.R. at 675. The focus is on the plan itself. *Id.*, *In re Madison Hotel Assoc.*, 749 F.2d 410, 425 (7th Cir. 1984). Good faith may exist "when there is a reasonable likelihood that the plan will achieve a result consistent with the objectives and purposes of the Bankruptcy Code." *In re Nikron, Inc.*, 27 B.R. 773, 778 (Bankr. E.D. Mich. 1983). A plan's proposal must be: a) in good faith, and, b) not by a means forbidden by law. *In re Sovereign Group, 1984-21 Ltd,* 88 B.R. 325, 328 (Bankr. D. Colo. 1988)(citing 5 Collier on Bankruptcy ¶ 1129.02 (15th ed. 1984)); *In re Food City, Inc.*, 110 B.R. 808, 811-12 (Bankr. W.D. Tex. 1990).

The Bankruptcy Court noted that the term "good faith" is not defined in the Bankruptcy Code. *Good Faith Opinion*, 244 B.R. at 675. The Bankruptcy Code referred to "good faith" as a "fuzzy" concept, intended to "allow courts to utilize their gut feelings about a plan's effects." *Id.* But the Bankruptcy Court did not exercise its "gut feelings" about the Plan. Only after a painstakingly careful review of the Plan did the Bankruptcy Court note concrete reasons for concluding the Plan was proposed in good faith. He noted that the Plan

was proposed as a "legitimate effort to rehabilitate a solvent but financially distressed corporation" faced with massive pending and potential future tort claims against it. *Id.* at 676-77. Such rehabilitation he found to be an articulated goal of chapter 11. *Id.* at 677. He further found the use of chapter 11 to resolve mass tort litigation is not violative of the § 1129(a)(3) good faith requirement, citing *In re Johns-Manville Corp.*, 68 B.R. 618, 632 (Bankr. S.D. N.Y. 1986). *Id.*

The Bankruptcy Court further found that the process of negotiating the Joint Plan supported a finding that the Plan was proposed in good faith. He noted especially the persuasive testimonies of Tommy Jacks, Scott Gilbert, Ralph Knowles and Arthur Newman which referenced the "intense arms-length negotiation" between the parties, the involvement of the Court's experienced Special Master Francis McGovern, and the input of qualified experts. *Id.* According to the Bankruptcy Court, the Plan effectively does what chapter 11 was designed to do. In this case, the Plan employs procedures that resolve the mass tort litigation, pay the Debtor's creditors, allow the Debtor to remain a viable corporation able to provide a return for Shareholders, pay taxes and provide jobs. *Id.*

Some Appellants have included an objection based on good faith in the arguments in support of their objections. The individual arguments that the Plan was not proposed in good faith are more fully addressed herein. Reviewing the Bankruptcy Court's factual findings under a clearly erroneous standard, the Court finds that the Bankruptcy Court did not clearly err in finding that the Amended Joint Plan was proposed in good faith, as more specifically addressed below under each party's arguments.

4. Best-Interest-of-Creditors Test/11 U.S.C. § 1129(a)(7)

Objections were made based on § 1129(a)(7). One objection is that disallowing the punitive damages claims violates § 1129(a)(7). Another objection is that the cap on the litigation fund also violates § 1129(a)(7).

Section 1129(a)(7) requires that each claimant, under a Chapter 11 plan of reorganization, either accept the plan or "receive or retain under the plan ... property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date." 11 U.S.C. § 1129(a)(7)(A)(ii). This provision is known as the best-interest-of-creditors test. This provision protects the interests of dissenters within a class by placing a floor on the bargain agreed to by the majority. Section 1129(a)(7)(A)(ii) ensures that the dissenting claimants receive in payment of their claims no less than what they would receive if the debtor were liquidated under chapter 7.

To determine whether a plan is in the best interests of the creditors, a bankruptcy court must review the facts before it by a preponderance of the evidence. *In re Trevarrow Lanes, Inc.*, 183 B.R. 475, 479 (Bankr. E.D. Mich. 1995). The Court finds that, under the clearly erroneous standard, the Bankruptcy Court's factual findings on the best-interest-of-creditors issue was supported by the record and the Bankruptcy Court did not clearly err in its findings as more specifically set forth under the parties' arguments below. The parties' individual arguments regarding the best-interests-of creditors test are addressed herein.

C. Parties' Arguments

1. Class 5 Domestic Claimants

The Amended Joint Plan of Reorganization classified breast implant claimants into three classes: Class 5 (Domestic Claimants); Class 6.1 (Foreign Claimants from countries with common law legal systems and/or with GDPs at least 60% of that of the United States); and Class 6.2 (Foreign Claimants from countries who do not have a common law legal system and have GDPs less than 60% of that of the United States).

a. Nevada Claimants

The Nevada Claimants consist of 45 claimants who objected to the proposed Amended Joint Plan. The Nevada Claimants agree that their claims are substantially similar with the other claimants in Class 5 as to their claims against the Debtor. However, the Nevada Claimants argue that their claims are not substantially similar to the other claimants in Class 5 because the Nevada Claimants have a judgment against Dow Chemical giving them certain rights that the other claimants do not have against Dow Chemical.[7] They argue that Dow Chemical is now collaterally estopped from relitigating the issue of liability in Nevada. The Nevada Claimants assert that their claims against Dow Chemical cannot be subjected to a *Daubert*[8] hearing. They also maintain that their claim under the classification issue is closely tied to

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[7] *See Mahlum v. Dow Chemical*, 970 P.2d 98 (Nev. 1998).

[8] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

the non-debtor discharge and good faith issues. They argue that either their claims be classified separately or their claims must be treated differently in order to receive "equal treatment" because of their rights against Dow Chemical based on the judgment the Nevada Claimants have against Dow Chemical. The Nevada Claimants also argue that because they have asserted punitive damages, their claims are different from other claimants who do not have punitive damages claims. The Nevada Claimants further argue that the Litigation Fund Facility is underfunded, and, therefore is not fair.

The Bankruptcy Court found the Nevada Claimants' collateral estoppel argument unpersuasive, noting that new scientific developments do not support the claimants' position that silicone gel causes disease, citing the Institute of Medicine Report and the MDL-926 Science Panel Report. *Classification and Treatment Op.*, 244 B.R. at 655 n.9. The Bankruptcy Court also found collateral estoppel was irrelevant to proper classification under § 1122(a) because the Plan classifies claims against the Debtor, not its Shareholders. 244 B.R. at 655. The Nevada Claimants acknowledge that in future breast implant trials involving Dow Chemical in Nevada Dow Chemical would be entitled to present new scientific evidence revealed since the *Mahlum* case was tried. Again, the Nevada Claimants also acknowledge that as to the Debtor, their claims are substantially similar to the other claimants in Class 5.

The Court agrees with the Bankruptcy Court's conclusion that Dow Chemical would not be collaterally estopped from presenting new evidence in Nevada in future trials against Dow Chemical in light of the Nevada Claimants'

concession on that point. Under § 1122(a), it is the nature and character of the claims *against* the Debtor which must be reviewed and not against third-parties. *See AOV Indus.*, 792 F.2d at 1150-51 ("the focus of the classification is the legal character of the claim as it relates to the assets of the debtor" and "[t]he existence of a claim against a third-party guarantor does not change the nature of a claim vis-a-vis the bankrupt estate and, therefore, is irrelevant to a determination of whether claims are 'substantially similar' for classification purposes."). The Bankruptcy Court did not address the Nevada Claimants' argument that Dow Chemical is collaterally estopped from relitigating its liability if the Nevada Claimants decide to elect litigation under the Joint Plan. However, the collateral estoppel issue may be addressed by way of a motion before the court handling the Nevada Claimants' litigation under the Joint Plan should the Nevada Claimants elect to litigate.

Regarding the *Daubert* issue, claims proceeding against Dow Chemical by way of trial would be governed by the Federal Rules of Evidence, including Rule 702 addressing expert testimony. *Brooks v. American Broadcasting Companies*, 999 F.2d 167, 173 (6th Cir. 1993). The difference between state law evidentiary rules and federal law evidentiary rules under *Daubert* does not go to the question of how a claimant's claim is classified or how a claim is treated within a class. It is the nature of the claim and not how evidentiary rules affect the claim that determines how a claim is to be classified. *AOV Indus.*, 792 F.2d at 1150. As to whether the claim is being treated fairly within the class, the inquiry is whether the claim is subject to the same process in satisfying the claim as the other claims within the class. *In re Central Medical Center, Inc.*, 122 B.R. 568, 575 (Bankr.

E.D. Mo. 1990). The evidentiary issues only come into play if the claimant chooses to litigate the claim and at such time those issues may be brought before the trial judge.

The Nevada Claimants' argument that they should be treated differently within Class 5 because of their judgment against Dow Chemical is without merit. The primary treatment provided under the Plan for claimants in Class 5 is the opportunity for a claimant to litigate the claim against the Litigation Facility. *Classification and Treatment Op.*, 244 B.R. at 660. The secondary treatment is the settlement option. *Id.* at 669. Although settlements are strongly favored and encouraged by law, settlement is merely an option to litigation which the claimant may voluntarily elect. *See, e.g., Franks v. Kroger Co.*, 670 F.2d 71, 72 (6th Cir. 1982). There is no requirement that settlement offers be proportional within a class in light of the second clause in § 1123(a)(4) which provides that disparate treatment of a claim is permissible if the holder of that claim "agrees to a less favorable treatment." 11 U.S.C. § 1123(a)(4). The requirement under § 1123(a)(4) that all claims be treated equally is satisfied when the class members are subject "to the *same process* for claim satisfaction." *In re Central Medical Center*, 122 B.R. at 575. Under a *de novo* review, the Bankruptcy Court did not clearly err in its conclusion that because the primary treatment provided under the Plan for Class 5 Claimants is the opportunity to elect litigation against the Litigation Facility the equal treatment requirement under § 1123(a)(4) has been met.

The Nevada Claimants contend that they should be treated differently within Class 5 because they are entitled to a claim of punitive damages claims. In its best-interest-of-

creditors opinion, the Bankruptcy Court noted that under 11 U.S.C. § 726(a), unsecured creditors are entitled to be paid not just the compensatory damages of their claim, but any exemplary, punitive or multiple damages, before equity is entitled to receive any distribution in a chapter 7 bankruptcy. *Best-Interests Opinion,* 244 B.R. at 728.[9] Under the Joint Plan, the equity security holders will retain their shares in the reorganized debtor while creditors who might be entitled to punitive or multiple damages would receive nothing for those claims. *Id.* The Bankruptcy Court stated that a theoretical right to recovery is of no moment unless those creditors are actually entitled to such damages. *Id.* The Bankruptcy Court found that based on the evidence presented at the hearing, a chapter 7 trustee would not pay punitive damages if the claims were liquidated. *Id.*

Based on the evidence presented at the hearing, the Bankruptcy Court's finding regarding punitive damages is not clearly erroneous. At the onset, the Nevada Claimants' punitive damages award was set aside. *See Dow Chemical Co. v. Mahlum*, 114 Nev. 1468, 970 P.2d 98 (1998). Mr. Arthur B. Newman, a senior managing director of The Blackstone Group, testified that in his opinion, in the aggregate, creditors would receive, under the Plan, no more than what creditors would receive in a chapter 7. (Conf. Hrg. Tr., 7/14/99 at 99) Before any unsecured claims can be paid, they must first be liquidated in a chapter 7 case. The cost of liquidating hundreds of thousands of claims would be monumental. *Best-*

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[9] The Bankruptcy Court did not address the punitive damages issue in its Classification Opinion but in its Best-Interest-of-Creditors Opinion.

Interests Opinion, 244 B.R. at 728. The chapter 7 trustee would probably defend liability, especially punitive damages. Frederick C. Dunbar, a senior vice-president at National Economic Research Associates, Inc., testified that he had studied every breast implant verdict on the past 3 1/2 years and found that no punitive damage verdict has been rendered since 1992. (Conf. Hrg. Tr., 6/30/99 at 48) The objectors did not present any evidence to support their argument that the claimants are entitled to punitive damages. The Bankruptcy Court did not clearly err in its finding that punitive damages would not be paid by a trustee in a chapter 7 case. Based on this finding, the Nevada Claimants' argument that they should be classified differently fails because no additional consideration is provided to them for the extinguishment of their punitive damages claims.

As to the Nevada Claimants' argument that the funding of the Litigation Facility is insufficient, the Bankruptcy Court found that the "evidence was overwhelming that $400 million net present value would be more than sufficient to pay all personal injury claims resolved through litigation in full even after factoring in the costs of the process." *Best-Interests Opinion,* 244 B.R. at 729.

Mr. Tommy Jacks, a plaintiff's personal injury lawyer who represented many clients suing the Debtor, and a member of the Official Committee of Torts Claimants, testified that based on his experience as a lawyer, the number of claimants electing settlement will be much greater than those who will elect litigation. The time factor and litigation environment, with the new reports regarding silicone gel causing diseases, will result in fewer claimants electing litigation. Mr. Jacks concluded that based on these reasons,

the $400,000,000 amount of funding for the Litigation Facility is sufficient to pay all claims in full. (Conf. Hrg. Tr., 6/28/99 at 161-63)

The Bankruptcy Court was very impressed by the Proponents' witness on this issue–Mr. Dunbar. Mr. Dunbar estimated that 7,513 people would elect to litigate against the Litigation Facility. Mr. Dunbar's methodology was based on the Revised Settlement Plan in the MDL 926 proceedings in the Northern District of Alabama. Because of the enhancements under the Joint Plan as opposed to the RSP, Mr. Dunbar testified that even more people would elect to settle in this case. Mr. Dunbar also relied upon the data from another mass-tort bankruptcy case, *A.H. Robins Co.*, for his conclusion on the number of claimants who will elect to litigate. Mr. Dunbar then determined the average award for each claimant proceeding to litigation. Mr. Dunbar compared the case at bar with the Dalkon Shield Claimants Trust experience from the *A.H. Robins* bankruptcy action. Professor Georgene M. Vairo, the chairperson of the Board of Trustees of the Trust since 1989, corroborated Mr. Dunbar's testimony. Mr. Dunbar testified that the average award would be $11,700.00 in nominal terms, for a total of approximately $88 million for all the claimants. Mr. Dunbar added in the administrative costs of resolving the claims, which he estimated at $43.6 million, for a total of about $131.6 million. Other silicone gel implant claims would amount to approximately $26 million. The total amount to dispose of all the disputed personal injury claims, including administrative and legal expenses, would be approximately $157.6 million. Over a 16-year life and with a 7% discount rate, the net present value of the figure is about $83 million.

The Bankruptcy Court found no credible evidence to rebut the testimonies presented by the Proponents. Reviewing the Bankruptcy Court's factual findings under a clearly erroneous standard, the Bankruptcy Court did not clearly err in its finding that the $400 million net present value funding of the Litigation Facility is almost five times what it will be necessary to satisfy all the claims against the Litigation Facility. *Best-Interests Opinion,* 244 B.R. at 731.

b. Marti Jacobs

Jacobs claims that her objections were not addressed by the Bankruptcy Judge. She argues that the Plan was not filed in good faith. The Settlement Facility is not feasible or fair. Jacobs claims that Class 5 was not an accepting class because only 61% of Class 5 Claimants accepted the Plan out of 175,679 Class 5 Claimants who were eligible to vote. Jacobs also claims that if the votes of future claimants were separated, Classes 5 to 7 would not have been accepting classes and the cram down rules would be applicable to all personal injury claimants classes. Jacobs further claims that the Personal Injury Claimants were not fully informed when they voted because Annex A was not served upon voting Creditor/Personal Injury Claimants. Annex A contained all of the Eligibility Criteria under the Settlement Facility, the Claims Resolution Procedures, the Litigation Facility Agreement, and the proposed Case Management Order. Jacobs argues that the classification of the personal injury claimants was designed to gain votes. The 180 days for a claimant to decide whether to opt in to the Settlement Facility or the Litigation Facility is too short of a time period. She claims that the treatment of claims within the class is unfair because there is no middle level for more severe neurological

diseases nor compensation for loss of wages, additional out-of-pocket expenses due to surgical reconstruction beyond explantations, no compensation after two years of ruptures, and future claimants who have not yet manifested disease are short changed. Jacobs also contests the composition of the Tort Claimants' Committee. Jacobs also objects to the manner in which the Bankruptcy Court conducted the proceedings below and rulings made by the Bankruptcy Court during the hearing, claiming that there was lack of representation of actual Personal Injury Claimants.

Jacobs contends that the Proponents did not present sufficient evidence at the hearing to satisfy the best-interests-of-creditors test. She claims the expert testimony of Arthur Newman regarding the sufficiency of the fund had no legitimate basis since Mr. Newman had never been a chapter 7 trustee and had never worked on a chapter 7 liquidation. Jacobs charges there is no evidence that a trustee would use the same general grid and payment scheme as the Joint Plan does. The Joint Plan violates the best-interest test because it proposes a cap on the claims of creditors who choose to litigate against the Litigation Facility and because the Debtor is solvent and remains so after confirmation. The Proponents have not met their burden that the claimants, at the end of the litigation will receive the full amount of their claim. Also, the bar in the Litigation Facility against the right to pursue punitive damage awards violates the best-interest test given that the Debtor will have $1 billion in equity. The alternative litigation procedures depressed the present value of potential recoveries against the Litigation Facility thus it does not satisfy the best-interest test. The Joint Plan fails the best-interest test because it fails to provide the spouses of implant recipients any recovery under the grid. There is no evidence

that spouses would not recover in a chapter 7 case. The Joint Plan fails the best- interest test because, in a liquidation, equity would recover nothing until creditors were paid in full. 11 U.S.C. § 726(a). Here, the over $1 billion in equity will inure to the benefit of the Shareholders even though the foreign claimants are not being paid in full and will receive only 35% to 60% of what the U.S. claimants with identical claims will receive.

The Bankruptcy Court's Opinions, Findings of Fact and Conclusions of Law on the Plan confirmation issues do not expressly mention Jacobs' objections. A review of the hearing transcript and record below indicate that Jacobs had the opportunity and did in fact present her objections before the Bankruptcy Court in writing and on the record. (*See, e.g.*, Conf. Hrg. Tr., 7/1/99 at 155-56; 7/2/99 at 117-18; 7/27/99 at 151-56, 260-72; 7/30/99 at 120-39) The Bankruptcy Court did address Jacobs' general objections to the classification and treatment of the claims under the Plan and whether the Plan was, in the best interests of creditors, fair and proposed in good faith.

With regards to whether the Plan was filed in good faith, based on the evidence presented at the hearing, the Bankruptcy Court did not clearly err in its finding that the Proponents of the Plan had met their burden of showing that the Plan was proposed and formulated in good faith under § 1129(a)(3). The Bankruptcy Court found that the legal costs and logistics of defending the worldwide product liability lawsuits against the Debtor threatened its vitality by depleting its financial resources and preventing its management from focusing on core business matters. *See In re Dow Corning Corp.*, 211 B.R. at 552-53. The Bankruptcy Court further

found that "the Plan was proposed in a legitimate effort to rehabilitate a solvent but financially-distressed corporation, besieged by massive pending and potential future product liability litigation against it--an articulated policy objective of chapter 11." *Good Faith Opinion,* 244 B.R. at 677. The Bankruptcy Court noted,

> As testified by Tommy Jacks, Arthur B. Newman, Scott Gilbert and Ralph Knowles, the Plan was the result of intense arm's-length negotiations between parties represented by competent counsel who were guided by an experienced Court-appointed mediator and the findings and recommendations of highly qualified experts. The Plan incorporates procedures to effectively resolve the multitude of tort claims that drove the Debtor into bankruptcy and will allow the Debtor to emerge from bankruptcy as a viable corporation with the ability to pay its creditors the full amount to which they are entitled, to continue providing a return for its stockholders, to pay taxes to the federal government and to innumerable state and local governments, and to provide jobs for its employees. This is exactly the result envisioned by the drafters of chapter 11.

244 B.R. at 677.

Based on the record before the Bankruptcy Court, this Court finds that its finding that the Plan was proposed in good faith was not clearly erroneous. The Bankruptcy Court looked

at the testimonies of various individuals who had negotiated the terms of the Joint Plan. The Bankruptcy Court also looked at the various provisions of the Joint Plan, in particular the provisions involving the resolution of the multitude of tort claims against the Debtor which claims drove the Debtor to seek bankruptcy protection. The Bankruptcy Court found that, in addition to resolving the tort claims against the Debtor, the Joint Plan would: pay the Debtor's non-tort claimant creditors the full amount to which they are entitled, including taxes to various taxing authorities; provide a return to its stockholders; and allow the Debtor to continue a viable business and provide jobs for its employees. There was sufficient evidence before the Bankruptcy Court to support its finding that the Joint Plan was proposed in good faith.

Jacobs' claim that Class 5 was not an accepting class is without merit. Section 1126(c) provides that acceptance is calculated by the percentage of acceptance of those who "accepted or rejected such plan." In other words, the acceptance rate is calculated by the number of claimants who actually voted either to accept or reject the plan, not based on the number of claimants eligible to vote as Jacobs argues. 11 U.S.C. § 1126(c).

Jacobs' claim that the tort claimants were not adequately informed because Annex A to the Joint Plan, which included various documents, was not attached to the Disclosure Statement is without merit. Before the Disclosure Statement was sent out to the various creditors, hearings were held on the contents of the Disclosure Statement. A review of the Disclosure Statement shows that the tort claimants were adequately informed of the various provisions of the Joint

Plan and the possible payment risks. (Conf. Hrg. Tr., 7/1/99 at 155)

Jacobs also claims that the Proponents classified the tort claims to gerrymander votes in violation of § 1122(a). Jacobs has not produced any credible evidence to support this claim. Jacobs' claim is substantially similar to the other claims in Class 5. All of the claims in Class 5 are unsecured unliquidated personal injury claims against the Debtor. The Bankruptcy Court's finding that the claims were properly classified is supported by the record. Jacobs has not presented any evidence to support her claim that the classification of tort claims was done to obtain votes. Jacobs does not identify a statutory basis for her objection that claimants need more than 180 days to decide whether to elect to enter the settlement or litigation facilities. Nor does Jacobs' objection that the treatment of claims within the class is unfair because certain injuries are not adequately compensated under the Settlement Facility specify a particular statutory provision. Neither of these objections go to issues regarding classification, treatment, good faith or the best-interests-of-creditors' test. There is no requirement under § 1123(a)(4) that a plan must provide strict proportional equality of payments within a class, especially if those claims are unliquidated. There is no statutory requirement that the Bankruptcy Court weigh the strengths and weaknesses of each and every claim so that each claim receives equal value. Section 1123(a)(4) "is not to be interpreted as requiring precise equality of treatment, but rather, some approximate measure [of equality]." *In re Resorts*, 145 B.R. at 447. The Bankruptcy Court's finding that the settlement offers to claimants in Class 5 meets the approximate measure of equality is supported by the evidence

submitted at the confirmation hearing. As noted previously, the primary treatment for each claimant is the same--the option to enter the Litigation Facility. The secondary treatment is also the same for each claimant--to enter the Settlement Facility. *Classification and Treatment Op.*, 244 B.R. at 669.

Both the Bankruptcy Court and this Court have addressed the issue raised by Jacobs' objections to the composition of the Tort Claimants' committee. No further appeal was taken from the district court's decision on the issue.

With regards to Jacobs' other objections, including the best interests of the creditors objection, sufficiency of the fund objection, and punitive damages objection, for the reasons set forth above and elsewhere in this opinion, the Court affirms the Bankruptcy Court's decision that the Joint Plan satisfies the best-interests-of-creditors' test.

c Beatrix Shishido

Beatrix Shishido, *pro se*, claims that the Plan is not fair. Shishido objects that the Plan provides for $1.4 billion in the Litigation Trust with only $400 million for the claimants who opt in to the Litigation Facility claiming that the $400 million is insufficient to pay the claimants who elect to litigate. Shishido argues that the Debtor never intended to settle the breast implant litigation but only used the reorganization plan as another tactic to stall the settlement proceedings. She further argues that the Proponents' contention that 94% of the claimants voted to accept the Plan is misleading because approximately 50% of the breast

implant claimants did not vote. To Shishido, this means that only 40% of those eligible to vote voted in favor of the Joint Plan and therefore the cram down provisions apply to all the breast claimants classes. Shishido claims that until an actual settlement offer is proposed to each claimant, no valid vote can be established to satisfy 11 U.S.C. § 1129(a)(10). Shishido argues that most of the affirmative votes came from law offices whose interests no longer correspond with their clients. She posits that the disclosure statement was inadequate to inform claimants who were not represented by counsel. Shishido objects to the Litigation Facility's requirement of a "general causation trial" to determine whether silicones can cause any of the diseases alleged. Shishido claims that the Bankruptcy Court's reliance on the Science Panel Report in the MDL-926 and the Institute of Medicine's study is misplaced because these reports are not accurate having been based on faulty data and having ignored the personal medical histories of women.

Most of Shishido's objections are similar to Jacobs' objections. Regarding Shishido's objection that the Litigation Trust $400 million cap is insufficient to pay Claimants, as noted above, the Bankruptcy Court did not clearly err in finding that the $400 million cap is sufficient to pay claimants who choose to enter the Litigation Facility. Shishido's objections regarding the voting results is without merit because Section 1126(c) only requires calculation of votes based on claimants who actually cast a vote either in favor of or against the plan. As to Shishido's claim that the Proponents have not offered a "true" settlement, as noted above, there is no requirement that the Bankruptcy Court weigh every single claim in order to determine whether all claims are treated equally. Shishido did not present evidence, other than her

conclusory allegations, to support her next argument that most "yes" votes came from law offices whose interests no longer correspond with their clients' interest. As noted previously, Shishido's claim that the disclosure statement was inadequate to inform the claimants who were not represented by counsel is not supported by the language of the Disclosure Statement. With regards to Shishido's claim that it is not fair that all claimants who elect to litigate must participate in a general causation trial to determine whether silicones cause certain diseases, Shishido has not identified a statutory basis for this objection. This Court has noted above that any claim in the Litigation Facility is subject to the Federal Rules of Civil Procedures and any procedural matters--including how to proceed with trial with similar issues may be agreed to by the parties. Regarding Shishido's claim that the MDL-926 Science Panel's findings are not accurate, the credibility of the Science Panel's findings will be addressed later in the litigation in a *Daubert* hearing, on a dispositive motion and/or at trial.

d. Altig Claimants[10]

The Altig Claimants include Rita Altig, Orriette Quandt, Gloria A. Greene, Christiane Clegg, joined by 66 other claimants, including 18 spouses. The Altig Objections are based on three points. First, they claim that the Plan does not provide equal treatment for similarly situated claimants provided by 11 U.S.C. § 1123(a)(4). Second, the Altig

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[10] The Bankruptcy Court referred to these claimants as the Morrison Claimants. *Classificaiton and Treatment Op.*, 244 B.R. at 655.

Claimants argue that the Debtor should state a specific amount it will put into the Plan as opposed to a ceiling which is currently used by the Plan. Third, the Altig Claimants contend that because the defects are legal ones, the Court has the power to approve the Plan and order the objections cured pursuant to *In re AOV Industries, Inc.*

The Altig Claimants specifically identified five objections to the Plan. First, the Plan allows each claimant one payment for rupture. The Altig Claimants assert that this limitation does not account for a claimant who has suffered multiple ruptures. Second, the Plan provides no separate settlement offers for spousal claims and, unless both spouses agree to litigate the claim, remain in the Settlement Facility. The Altig Claimants suggest that a method to separate payments to each spouse should be implemented because there may be conflicts between spouses, in particular when there are divorce proceedings involved, or the husband or wife resides in community property states and a husband may have to share the payment with the wife. Third, the payment schedule for those who have not manifested any injuries does not take into account inflation, especially in medical costs. Fourth, the payment plan and yearly ceilings the Debtor has to pay in any given year denies a claimant who has settled a claim in one year the right to receive interest on the money owed to the claimant. Fifth, the Plan's elimination of claims for punitive damages is not because of insufficient funds but because the Debtor does not wish to be subjected to those damages. The Altig Claimants acknowledge that some states do not allow punitive damages but argue that, for those claimants who are in States that allow punitive damages, this constitutes unequal treatment.

Addressing the Altig Claimants' first objection--that the rupture payments under the Settlement Facility are insufficient because the Plan does not allow payment for multiple ruptures, as noted previously, there is no requirement under the Code that the Bankruptcy Court evaluate each and every claim in order to find the Plan fair. All claims are treated equally within Class 5 because the primary treatment is the opportunity to litigate the claim in the Litigation Facility where the claim will be paid in full. The secondary treatment is the opportunity to choose to resolve the claim in the Settlement Facility where a claimant is allowed only one rupture payment. The second clause of Section 1123(a)(4) requires equal treatment unless a claimant agrees to a less favorable treatment-- such as choosing to accept a settlement offer in the Settlement Facility.

As to the Altig Claimants' objection that the treatment of consortium claims is unfair because it requires the breast implant claimant to agree to either settle or litigate and does not give the consortium claimant the right to independently choose either to litigate or settle. The Bankruptcy Court found that this specific provision complies with § 1123(a)(4). *Best-Interests Opinion,* 244 B.R. at 753. The Bankruptcy Court noted that, in a non-bankruptcy context involving a loss of consortium claim, there is usually no settlement between the parties if both spouses, including the loss of consortium claimant, do not agree to settle all claims. 244 B.R. at 754. The Joint Plan provides for payment of consortium claims, either under the Litigation Facility or the Settlement Facility. The Bankruptcy Court did not clearly err in finding that the Plan's provision regarding treatment of consortium claims is not prohibited by title 11.

The Altig Claimants next claim that the payment schedule for future claimants is not fair because the payment schedule does not take into account inflation. The Altig Claimants have not cited to any provision of the Bankruptcy Code where adjustment for inflation must be taken into account in any payment schedule. The Settlement Facility allows unmanifested claimants to qualify for disease compensation at any time within 15 years of the Joint Plan's effective date, without fear of statute of limitations defenses. Settlement Facility Agreement, § 6.02(d). The evidence at the confirmation hearing supports the Proponents' position that the Joint Plan arrived at a fair, marketbased global settlement option. Other than the Altig Claimants' conclusory statements, they have not presented any evidence that the payment schedule under the Settlement Facility is unfair. The same reasoning is applied to the Altig Claimants' fourth objection--that the payment plan and yearly ceiling the Debtor has to pay denies a claimant any interest on the money owed to the claimant. As noted elsewhere in this Opinion, § 1123(a)(4) allows different treatment of a claimant who chooses to be treated less favorably, such as choosing the settlement option. If a claimant wishes to receive payment in full then the claimant may choose the litigation option.

Regarding the Altig Claimants' last objection--the elimination of the punitive damages claims--the record supports the Bankruptcy Court's finding that the Plan's provision eliminating punitive damages is within the best interests of the creditors. *Best-Interests Opinion,* 244 B.R. at 729. (See this Court's prior analysis.) The Altig Claimants have not presented any credible evidence to overcome the evidence presented at the hearing. As to the Altig Claimants' argument that the reason punitive damages were not allowed

under the Plan was because, in a chapter 7 scenario, there would be insufficient funds to pay for the punitive damages, but that the Debtor did not want to be subjected to those damages--such a claim may be true. However, the Altig Claimants have not sufficiently refuted the evidence at the confirmation hearing that there would be insufficient funds to pay for the punitive damages as found by the Bankruptcy Court. *Best-Interests Opinion,* 244 B.R. at 728. The Bankruptcy Court's finding that the Joint Plan's disallowance of the punitive damages is proper under the Code is sufficiently supported by the facts and is not in error.

The Altig Claimants generally argue that the Bankruptcy Court or this Court has the authority to rewrite the Joint Plan. The Code states that only the proponents can modify a plan and that this Court's role on appeal is either to affirm or reverse the Bankruptcy Court's confirmation of the Joint Plan. 11 U.S.C. § 1127(b).

e. Lacy Appellants

The Lacy Appellants, representing certain individual's Children's claims, argue that the Litigation Fund Facility is underfunded and will not adequately satisfy the Children's claims. The Lacy Appellants claim that the Plan Proponents have ignored the evidence regarding the higher incidence of systemic sclerosis and esophageal dysfunction in children who are exposed to silicone gel *in utero* or through breast milk. The Proponents have therefore discounted the Children's future claims and considered them negligible under the Plan. The Lacy Appellants also argue that the Proponents engaged in witness tampering during the hearings before the Bankruptcy Court. The Lacy Appellants claim that the

Proponents's argument that the children have the option of seeking a remedy in the Litigation Fund Facility is flawed because the Litigation Fund is underfunded and will not be sufficient to satisfy the Children's claims. These Appellants further contend that because there is a 10 year latency period before the disease can be detected and many women are still of child bearing age, the Plan's provision requiring that claims be filed prior to the 15th year of the Effective Date of the Plan impedes the Children's rights, especially in many states where the statute of limitations begins when they reach the age of majority. The Plan obstructs the Children's property rights which violates their Fifth Amendment right to property. The Lacy Appellants argue that since the Plan is unconstitutional as to one class, it is unconstitutional to all classes. These Appellants contend that the Plan does not comply with 11 U.S.C. § 1129(a)(1), was not made in good faith, and is not fair with respect to children's claims.

Regarding the Lacy Claimants' claim that the Joint Plan is unconstitutional as to the Children's property rights under the Fifth Amendment, the Supreme Court has held that the Fifth Amendment "does not prohibit bankruptcy legislation affecting a creditor's remedy for its enforcement against the debtor's assets, or the measure of the creditor's participation therein, if the statutory provisions are consonant with a fair, reasonable, and equitable distribution of those assets." *Kuehner v. Irving Trust Co.*, 299 U.S. 445, 452 (1937). Inasmuch as the Lacy Claimants argue that the Settlement Facility offers regarding children's claims are insufficient, they have also conceded that, if any claimant wishes to have their claim paid in full, they then have the primary option of seeking litigation against the Litigation Facility. The Lacy Appellants claim this is an empty promise

because the Joint Plan is not adequately funded under the Litigation Facility. The Lacy Appellants support their claim of inadequate funding by noting that the Children's claims were discounted and the Proponents did not consider that silicone gel induced disease has a latency period of ten (10) years and the fact that many affected women are still of child bearing age. Aware that there is no evidence in the record to rebut the pervasive testimony of experts on the adequacy of the fund, the Lacy Appellants raise a serious allegation that the Proponents engaged in witness tampering during the confirmation hearing before the Bankruptcy Court. Yet, the Lacy Appellants produce only a bare assertion that their witness, Professor Douglas R. Shanklin, is now prepared to testify and made no record at the confirmation hearing regarding what his testimony would be.

The Lacy Claimants' objection under § 1129(b)(1) (the cram down provision) is without merit since that section only applies if a class has rejected a plan. The Lacy Claimants are Class 5 members whose class voted to accept the Joint Plan.

f. Pennsylvania Class 5 Claimants

Certain Pennsylvania Class 5 Claimants appeal claiming that the Joint Plan treats them improperly because they are relinquishing greater rights than other Class 5 claimants, specifically, their claims against physicians. The Bankruptcy Court noted in its best-interests opinion that the Pennsylvania Class 5 Claimants did not argue in their brief filed after the confirmation hearing that they were misclassified. The Bankruptcy Court noted that the Pennsylvania Claimants assert their difference based on the Pennsylvania law of informed consent, even though they

failed to demonstrate that Pennsylvania law is different from the rest of the United States. The Bankruptcy Court read this as an objection under § 1129(a)(1). The Bankruptcy Court went on to find that because of its ruling that the release and injunction provisions are not binding on rejecting claimants, Pennsylvania Claimants who rejected the Plan "have nothing about which to complain" and those who accepted the Plan have also accepted the release in favor of the Settling Physicians and Healthcare Providers. *Best-Interests Opinion,* 244 B.R. at 748-49. Since this Court has ruled the injunction and release provisions are applicable, the Court addresses the Pennsylvania Claimants' objections under § 1123(a).

The Plan requires that § 1123(a)(4) expressly allows different treatment within a class if the class member so agrees. If the Class 5 Claimants agree to settle their claim, then they are entitled to a lesser treatment, such as giving up their claim against a physician, because they choose and agree to settle their claim with the Settlement Facility. If the Pennsylvania Class 5 Claimants believe that they do not want to give up their claim against the physicians, then they may choose the litigation option where their claims will be paid in full. The Pennsylvania Class 5 Claimants are given the same treatment as all Class 5 Claimants–primarily to retain their right to litigate, and, secondarily, to settle their claim as set forth in the Amended Joint Plan. To the extent the Pennsylvania Claimants' objections are similar to those raised by the Nevada claimants, that they are given greater consideration than other class members, this Court's analysis of the Nevada Claimants' appeal is applicable to the Pennsylvania Claimants.

2. Classes 6.1 and 6.2 Foreign Claimants

a. New Zealand

The Foreign Claimants' arguments will first be summarized and then followed by the analysis and this Court's conclusions regarding the various arguments.

Certain New Zealand resident breast implant claimants argue that the Bankruptcy Court erred in its conclusion that they are properly classified as Foreign Claimants under Class 6.1. The New Zealand Appellants argue that their claims are not substantially similar to other Foreign Claimants in Class 6.1 because they are not subject to *forum non conveniens* dismissal.

In 1992, New Zealand enacted the Accident Rehabilitation and Compensation Insurance Act 1992 (N.A.) (the "1992 Act") which provides in § 135(5) that a person who suffered a personal injury prior to the enactment of the Act on July 1, 1992, but did not make a claim for compensation before October 1, 1992, would have their entitlement to compensation determined by whether the injury that they suffered was entitled to be covered under the 1992 Act. If their injury was not entitled to be covered under the 1992 Act, they would still be barred from pursuing a common law claim for damages. In 1995, the MDL-926 Court held that New Zealand Claimants who suffered injuries between 1974 and July 1, 1992, and who had not filed statutory compensation claims by October 1, 1992, had neither an administrative nor a judicial remedy available in New Zealand, thus, they had no alternative forum to litigate their claims, other than here in the United States. In *Ashley v. Dow*

Corning Corp., 887 F.Supp. 1469, 1475 (N.D. Ala. 1995), the MDL-926 Court dismissed the other foreign claimants' claims but denied the dismissal without prejudice as to the New Zealand claimants. The New Zealand Appellants argue that the 1992 Act does not bar common law actions for personal injury claims outside of New Zealand against non-residents of New Zealand.

The New Zealand Appellants also argue that the Michigan choice of law provision would apply Michigan law because New Zealand has no interest in applying New Zealand law to the New Zealand Appellants' claim. The New Zealand Appellants claim that the Proponents have not provided any evidence that the Debtor contributed to the compensation system in New Zealand as an employer in New Zealand or as a manufacturer doing business in New Zealand. The New Zealand Appellants argue that the 1992 Act does not bar common law actions for personal injury claims outside of New Zealand against non-residents of New Zealand.

b. Shainwald Appellants

The Shainwald Appellants are foreign breast implant claimants represented by the Law Offices of Sybil Shainwald, P.C. The firm represents hundreds of foreign claimants from the following countries: Argentina, Belgium, Canada, France, Germany, Israel, Italy, Ireland, the Netherlands, New Zealand, South Africa, and Switzerland.

The Shainwald Appellants claim that the Bankruptcy Court erred in approving the classification of claimants. They argue that the Joint Plan violates the requirement of Bankruptcy Code §§ 1122 and 1123 because the claims within

the two foreign claimants classes (Classes 6.1 and 6.2) are not substantially similar. They also argue that classifying the two foreign breast implant claimants in Classes 6.1 and 6.2 separately from the domestic breast implant claimants in Class 5 is unlawful under § 1122 of the Act. The Shainwald Appellants further argue that the Joint Plan violates § 1123(a)(4) by providing different benefits to members of the same class. They claim that the Debtor engaged in gerrymandering when the countries were misclassified in Class 6.2 and that the Bankruptcy Court erred in treating Class 6.2 as an accepting class. The Shainwald Appellants also maintain that the Joint Plan unfairly discriminates against Class 6.2, is not fair and equitable to its members, and was not proposed in good faith. The Shainwald Appellants assert that the Joint Plan violates United States Treaty obligations and violates their constitutional rights. Finally, the Shainwald Appellants argue that the Bankruptcy Court erred in excluding the proposed expert testimony of the Shainwald Claimants.

c. Australian Claimants

Australian Claimants, classified under Class 6.1, contend that the Bankruptcy Court erred in confirming the Joint Plan because the Proponents failed to satisfy their burden of establishing that the claims held by the Australian Claimants warrant separate classification from Class 5. The Australian Claimants argue that the Bankruptcy Court erred in its interpretation of *U.S. Truck* that separate classification is permitted so long as there is a "legitimate purpose." The Australian Claimants assert the inquiry should be whether the claims are similar or dissimilar and that the factors to be considered under *U.S. Truck* are whether the claimants: 1) have a different stake in the "future viability" of the debtor;

and 2) have "alternative means" at their disposal to protect their unsecured claims. *U.S. Truck*, 800 F.2d at 586. The Australian Claimants argue that both the domestic and foreign claimants share, equally, a stake in the future viability of the Debtor. All tort claimants also have the same alternative means to protect their unsecured claims–either settle their claims with the Settlement Facility or litigate against the Litigation Facility. Because both the domestic and the foreign claimants have similar claims, the Australian Claimants argue that applying the two factors set forth in *U.S. Truck*, separate classification and treatment of domestic and foreign claims is not justified.

The Australian Claimants contend that the legal character of the Australian breast implant claims in Class 6.1 is not materially different from that of the domestic breast implant claims in Class 5. The Australian Claimants argue that the formula used to justify the disparate treatment of Australian women was arbitrary, capricious and unprecedented and did not support the 40% reduction in the amount of recovery from those of the Domestic Claimants. The Australian Claimants attack the evidence presented at the confirmation hearing insisting that it did not establish that the legal systems of the United States and Australia are different but instead established that the legal systems are similar. They maintain that any dispute over the substantive law applicable to claims brought in Australia is moot because some Australians have availed themselves of the benefits of the U.S. legal system such as the MDL Action and class action suits filed in Texas. The Australian Claimants assert that these claims are likely not subject to dismissal on *forum non conveniens* grounds because they were filed prior to changes in Texas law and have the benefit of pre-existing law.

Challenging the evidence presented regarding the economic distinction between domestic and foreign claims based on each country's gross domestic product ("GDP"), the Australian Claimants argue that this fails to explain the difference in the treatment of breast implant claimants based on their country of origin. The Australian Claimants insist there is also no rational, consistent principle behind the grouping of countries in Classes 6.1 and 6.2 since some of the countries in 6.2 have a GDP which is actually higher than the GDP in countries under 6.1. The Australian Claimants assert that the Proponents' reliance on the *Pfizer*[11] mass tort class action settlement categories was misplaced. They note that the *Pfizer* case was not a bankruptcy case and the court was not bound by chapter 11 confirmation requirements. The evidence established that the percentage categories in *Pfizer* were floors on what could be paid to foreign claimants, not ceilings as in the Joint Plan.

The Australian Claimants suggest they fared better under the *Pfizer* formula than they would under the terms of the Joint Plan. The Australian Claimants believe that the more relevant case is the *Robins* case which resolved a global product liability stemming from personal injuries caused by the Dalkon Shield in a bankruptcy setting. The foreign personal injury claimants received treatment equal to that afforded to their domestic counterparts. The Australian Claimants also cite *In re Agent Orange Product Liability Litigation*, *In re Johns-Manville Corp.*, *In re Eagle-Picher Indus., Inc.*, *In re Forty-Eight Insulations, Inc.* and *In re Standard Insulations, Inc.* to support their argument that these

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[11] *See Bowling v. Pfizer, Inc.*, 143 F.R.D. 141 (S.D. Ohio 1992).

plans did not provide for structurally guaranteed discrimination against foreign personal injury claimants.[12]

The Australian Claimants also maintain that, because a U.S. citizen who received her implants in Australia and resides in Australia is considered a "domestic claimant" entitled to participate in Class 5, this shows that the Proponents had no valid basis for treating foreign and domestic claimants separately.

The Australian Claimants next argue that confirmation of the Joint Plan was a violation of the due process and equal protection guarantees of the Fifth Amendment to the U.S. Constitution. They claim the Joint Plan is unconstitutional because foreign claimants will receive no more than 35% or 60% of what the U.S. claimants with identical claims will receive based solely on the fact that they hail from foreign countries. The Australian Claimants assert that they are lumped in with claimants from a less-than homogenous group of countries. The evidence at the confirmation hearing shows that Australia is more like the United States than the countries with which they are categorized such as the United Arab Emirates or Kuwait.

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[12] *See In re "Agent Orange" Product Liability Litigation*, 100 F.R.D. 718, 26 (E.D. N.Y. 1983); *In re Johns-Manville Corp.*, 52 B.R. 879 (Bankr. S.D. N.Y. 1985); *In re Eagle-Picher Industries, Inc.*, 167 B.R. 102 (Bankr. S.D. Ohio 1994); *In re Forty-Eight Insulations, Inc.*, 58 B.R.476 (Bankr. N.D. Ill. 1986); and *In re Standard Insulations, Inc.*, 138 B.R. 947 (Bankr. W.D. Mo. 1992).

The Australian Claimants also claim that punitive damages are available in Australia. The greater availability of juries in the U.S., the loser pays system of fee recovery in Australia, the greater availability of contingency fees in the U.S., and the relative damage awards between the U.S. and Australia does not justify a 40% reduction, according to the Australian Claimants. The Australian Claimants note that the Proponents' logic in creating a separate class based on legal systems is not applied to domestic claimants even though each state may have different types of tort law and procedures. The Proponents have violated § 1122(a), based on this analysis, because it requires that the claims be in the same class to be "substantially similar" and the Bankruptcy Court erred in confirming the Plan.

The Australian Claimants are designated in two classes–Classes 6.1 and 6D. Class 6D is made up of Australians who elect to be treated under the Australian Breast Implant Settlement Option. The Australian Claimants argue that the Proponents cannot meet their burden of establishing that claimants in Class 6.1 and Class 6D will receive the same treatment or that all of the holders of claims in Class 6D have agreed to less favorable treatment. The Proponents have been allowed to circumvent the requirements of Section 1123(a)(4) by placing this impermissible treatment in the guise of an "option" within the Joint Plan and the Settlement Option does not comply with Section 1129(a)(1).

Finally, the Australian Claimants argue that the Joint Plan was not proposed in good faith with respect to the treatment of foreign claimants. The Joint Plan arbitrarily limits foreign claimants to either 35% or 60% of the sums awarded to domestic claimants holding identical claims solely

on the basis that they are not U.S. citizens. The similarly situated creditors are not treated "fairly or equally." The Debtor has refused to devote the full range of its resources to repayment of claims since the Debtor retains $1 billion in equity while the foreign claimants are entitled to only 35% or 60% of payments compared to U.S. women. The equity goes to the Debtor's shareholders, Dow Chemical and Corning, which are both wealthy Fortune 500 companies who control the Debtor's Board of Directors. Furthermore, the Australian Claimants assert that the foreign claimants were excluded from the plan negotiations. Ms. Shainwald, a member of the Tort Claimants' Committee who represents many foreign claimants, was not allowed any input into the negotiated terms affecting foreign claimants. The Australian Claimants argue that the Tort Committee is improperly constituted and is not a committee within the meaning of 11 U.S.C. § 1102(a)(1). In essence, the Australian Claimants lament that the Tort Claimants' Committee turned its back on the foreign claimants.

d. Korean Claimants

The Court allowed Yeon Ho Kim, representing certain Korean Claimants, to argue at the hearing over the Proponents' objection that the Korean Claimants had not filed an appellate brief on appeal and were not properly before the Court.

Mr. Kim argued that the Proponents engaged in gerrymandering by their classification of foreign claimants, specifically the Korean Claimants. Mr. Kim argued there is no case law which approves classifying the foreign claimants separately. The Korean Claimants assert that the classification

of the Korean Claimants in 6.2 discriminates against Asian countries noting that: Korea has a greater GDP than Greece, yet Greece is classified in Class 6.1; the category 3 countries do not have the same GDP; there is no reason why Korea was placed in the same category as others with 3% GDP; and not all the countries in Class 6.1 are common law states nor a member of the European Union Community.[13]

e. Analysis re Classes 6.1 and 6.2

1. Classifications of the foreign claimants

In its Opinion on the classification and treatment of the foreign claimants, the Bankruptcy Court concluded that the Plan's classification of foreign claims complies with § 1122(a). *Classification and Treatment Op.*, 244 B.R. at 664. The Bankruptcy Court extensively analyzed the foreign claimants' objections. The Bankruptcy Court made the following general findings as to breast implant claimants:

> We begin by noting a fairly obvious point upon which there is virtually no

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[13] The Korean Claimants' arguments regarding classification are addressed in this Opinion. The Court notes that there is no brief on appeal filed by the Korean Claimants. On January 24, 2000, the Court issued an Order allowing briefs to be filed on any appeals related to the Confirmation Order issued by the Bankruptcy Court. Because no brief on appeal was filed by the Korean Claimants, the Korean Claimants' appeals must be dismissed pursuant to the January 24, 2000 Order, Bankruptcy Rule 8001(a) and E.D. Mich. LR 41.2 for failure to prosecute the appeal.

disagreement: all breast-implant claims, both domestic and foreign, are substantially similar. All are unsecured, unliquidated and disputed tort claims arising out of the Debtor's sale and manufacture of silicone-gel breast implants. All such claimants allege that the breast implants caused or will cause them personal injuries.

Moreover, the claims within each class of breast-implant claims are substantially similar in legal nature and character. In addition to the common characteristics noted above, claims within each class possess certain other characteristics that are unique to that class. For instance, Class 5 claimants are all citizens of the United States or residents of the Greater U.S. All class 6.1 claimants are residents of countries that either: belong to the European Union, have a common law tort system, or have a per capita GDP that is greater than 60% of the United States' per capita GDP. And all Class 6.2 claimants are residents of countries that: do not belong to the European Union; do not have a common law tort system; and do not have a per capita GDP that is greater than 60% of the United States' per capita GDP.

The real question is whether there is a legitimate reason for classifying breast-implant claims in three separate classes. As explained below, the answer to this question is yes.

Classification and Treatment Op., 244 B.R. at 658. The Bankruptcy Court, applying the "legitimate reason" standard, found that based on the *Debtor's judgment*, "different breast-implant claims warrant different settlement offers is a perfectly 'legitimate reason' to classify those claims separately." *Id.* at 664 (emphasis added). The Bankruptcy Court found that in ascertaining the amount it would offer the foreign claimants under the Settlement Facility, "the Debtor relied on a number of factors such as differences in substantive and procedural legal rights and differences in economic conditions." *Id.* "There is nothing arbitrary, unreasonable or irrational about using such factors for this purpose." *Id.*

Based on the testimony and evidence presented at the hearing, the Court concludes that the Bankruptcy Court's finding that the classification of the foreign claimants satisfied § 1122(a) was not clearly erroneous. At the onset, it is noted that both foreign claimant classes are accepting classes. At least 66 2/3% of a class is needed to constitute an accepting class. 11 U.S.C. § 1126(c) provides that "[a] class of claims has accepted a plan if such plan has been accepted by creditors, ..., that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors, ..., that have accepted or rejected such plan." 11 U.S.C. § 1126(c). Class 6.1 voted to accept the Plan with 78.9% voting in favor of the Plan. Initially, Class 6.2 did not meet the criteria for acceptance because Class 6.2 only had an acceptance rate of 65.8%. However, during the confirmation hearing, the parties submitted a proposed plan modification which increased the favorable percentage and made Class 6.2 an accepting class. *See In re Dow Corning Corp.*, 237 B.R. 374 (Bankr. E.D. Mich. 1999). The issue of

whether the Plan unfairly discriminates against *within* class members is not an issue to be determined under either Class 6.1 or Class 6.2 because the cram down requirements under § 1129(b) are not triggered since neither class is a rejecting class. 11 U.S.C. § 1129(b)(1)(A plan which meets all conditions of § 1129(a), ... can be confirmed only if the court finds that the plan 'does not discriminate unfairly' against the *rejecting, impaired class*.) The issue only arises when an impaired class has rejected a proposed plan. In this case, both Classes 6.1 and 6.2 accepted the proposed plan.

The evidence presented by the Proponents on the costs of resolving the foreign claims was considered by the Bankruptcy Court in its finding that Classes 6.1 and 6.2 were properly classified.

The Proponents presented the testimony of three expert witnesses: Professor Basil Markesinis, Mr. Augustus Ullstein and Professor Harold Luntz. All three testified extensively on direct and on cross-examination. The background of each of the witnesses will be summarized because the Bankruptcy Court found the Proponents' experts' testimonies more credible than those presented by the objecting claimants. Professor Markesinis is a professor of law and holds chairmanships at the following institutions: the University of Oxford in England, the University of Leiden in The Netherlands, and the University of Texas School of Law. He teaches in the areas of comparative law, comparative methodologies, tort law, and European law. Professor Markesinis has earned four Ph.D.'s and three honorary degrees. He is a Fellow of the British Academy, a Corresponding Fellow of the royal Belgian Academy, a Fellow of the Academy of Athens, a Foreign Fellow of the

royal Dutch Academy, and a Member of the American Law Institute. Professor Markesinis is an expert on the tort law systems of the legal systems of Europe, including Germanic, English and Romanesque/French, and, is knowledgeable on the proliferation and implementation of these systems to other countries. He has written extensively on comparative law, including authoring about 20 books and over 100 legal articles. Professor Markesinis served on the *Pfizer* Foreign Fracture Panel, appointed by the district judge in the class action case of *Bowling v. Pfizer*, No. C-1-91-256 (S.D. Ohio 1995). The panel was to determine the fair settlement levels for foreign tort claimants. *Classification and Treatment Op.*, 244 B.R. at 659-660 n.13; Proponents' Ex. 22, *curriculum vitae* of Professor Markesinis; Conf. Hrg. Tr., 6/30/99 at 271-86 and 7/1/99 at 11-43.

Mr. Ullstein is a practicing barrister in the United Kingdom and a Queen's Counsel. He specializes in products liability litigation in England and has knowledge regarding the tort systems and verdict values in the United Kingdom, Germany, The Netherlands, and South Africa. Mr. Ullstein also served on the Pfizer Foreign Fracture Panel. 244B.R. at 659-660 n.14, Proponents' Ex. 23, *curriculum vitae* for Mr. Ullstein; Conf. Hrg. Tr., 7/1/99 at 288-292.

Professor Luntz is a professor of law at the University of Melbourne in Australia. He is knowledgeable in both the tort systems and damage awards in both Australia and New Zealand. Professor Luntz authored a number of books and articles on tort law, including "Assessment of Damages for Personal Injury and Death." The book is now in its fourth edition. He is also an editor of the Torts Law Journal in Australia and was also a member of the Pfizer Foreign

Fracture Panel. *Classification and Treatment Op.*, 244 B.R. at 660 n.15; Proponents' Ex. 24, *curriculum vitae* for Mr. Luntz; Conf. Hrg. Tr., 7/2/99 at 59-63.

Professor Markesinis testified that it is appropriate for the Plan to differentiate between foreign and domestic breast-implant claimants because tort recoveries in foreign legal systems are much lower than tort recoveries in the United States based on several factors, including legal, economical, and cultural factors. (Conf. Hrg. Tr., 7/1/99 at 12-41) He testified the specific factors include:

> The availability of strong social security system payments in foreign countries; that most tort cases in foreign countries are tried by judges, not juries; that punitive damages are typically not available in foreign countries or are available in only limited instances; that foreign countries lack American-style contingency fees; that foreign countries exhibit lower tort awards, and different, less plaintiff-friendly standards of liability; that cultural factors in foreign countries lead to a diminished propensity to litigate; that more plaintiffs proceed in foreign countries on a pro se basis; and that significant weight is given in foreign countries to semi-official medical reports completed at the direction of the government.

Classification and Treatment Op., 244 B.R. at 660 n.16; Conf. Hrg. Tr., 7/1/99 at 12-41.

These factors were also cited for the differentiation of the settlement offers between foreign countries. (Conf. Hrg. Tr., 7/1/99 at 40) Specifically, Professor Markesinis testified that based on his experience on the *Pfizer* panel, the foreign countries were grouped into four different categories which he concluded was a fair and reasonable approach to determine the compensation levels for each category. (Conf. Hrg. Tr., 7/1/99 at 46) The countries in this case are classified in Classes 6.1 and 6.2. The foreign countries are then placed into 4 categories similar to those in the *Pfizer* case. Class 6.1 of the foreign claims consists of countries in Categories 1 and 2. Class 6.2 consists of countries listed in Categories 3 and 4.

Professor Markesinis testified to five reasons for his opinion as to the reasonableness of the categorization. First, he testified that the categories covered a variety of legal systems effectively. Second, he contended that the process was appropriate for the eight months time frame the panel was charged with to prepare a report. His third reason was that the data available for many of the "lesser countries" would be difficult to find. Fourth, even for the countries where data was not available, the general information the panel acquired about those countries, concerning the linkage with the major legal systems, and the purchasing and spending powers of those countries, was sufficient to allow the panel to prepare its analysis. Finally, taking all those factors together, the process used was a pragmatic way in his opinion to proceed to resolve a major and complex kind of case. (Conf. Hrg. Tr., 7/1/99 at 49-50)

The *Pfizer* panel then formulated a translation of the U.S. compensation formula to each of the countries in the four categories. The panel began with the countries in

Categories 1 and 2. Professor Markesinis testified that these countries had the most "developed" and "sophisticated" legal systems. They were countries with the most data available with higher damage awards. (Conf. Hrg. Tr., 7/1/99 at 51) In developing the formula for the Categories 3 and 4 countries, the panel faced difficulties in obtaining reliable data. (Conf. Hrg. Tr., 7/1/99 at 53) They were guided by some data or books and a variety of economic factors, including the GDP, earning powers, spending power, and cost of living for each country. (Conf. Hrg. Tr., 7/1/99 at 54) Professor Markesinis testified that, as you move from the United States to England, Europe and to the east, the degree of sophistication, the available material, the use of statistics, the available figures, the substructure, and the economic substructure of the countries, with few exceptions, all become "thinner." (Conf. Hrg. Tr., 7/1/99 at 54)

Professor Markesinis testified that the panel had considerable powers and the ability to obtain information, including the opportunity to request legal opinions from practicing lawyers for countries like Japan, India and Egypt. (Conf. Hrg. Tr., 7/1/99 at 56-57)

Based on the categorization of the countries, the panel then calculated the compensation figures. Professor Markesinis concluded that the compensation figures in all the categories would have been lower absent the minimum figure attached to each category. (Conf. Hrg. Tr., 7/1/99 at 59) Professor Markesinis testified that the panel could not analyze the figures for each country in all the categories but the panel managed to come up with a pragmatic formula for each category based on various factors, including: reviewing a the tort and legal systems, the basic principles of law that applied

to the lead countries, and taking account various economic factors. (Conf. Hrg. Tr., 7/1/99 at 61-63) After a fairness hearing, the district judge in the *Pfizer* case approved the settlement structure as presented by the Panel's Final Report. (Pr. Exs. 49 and 50)

Professor Markesinis then compared the formula approved in the *Pfizer* case to compensate foreign claimants to the Joint Plan's compensation formula for foreign claimants. He testified that the methodology used in the Joint Plan is "very largely" the same basis of distinction of the countries found in the *Pfizer* case. Professor Markesinis further testified that the Joint Plan was more favorable than the *Pfizer* compensation plan because the Category 6.1 claimants under the Joint Plan, which are the countries in Categories 1 and 2 in the *Pfizer* plan, would receive 60% of the American award whereas the *Pfizer* Categories 1 and 2 only received 32% of the American award. (Conf. Hrg. Tr., 7/1/99 at 67) Similarly, Professor Markesinis testified that those claimants under the Joint Plan's Class 6.2, which are the countries in Categories 3 and 4 of the *Pfizer* plan, will also receive more than the *Pfizer* claimants because Class 6.2 claimants would receive 35% of the American award compared to 16% and 8% respectively of the American award under the *Pfizer* settlement. (Conf. Hrg. Tr., 7/1/99 at 67) Professor Markesinis concluded that the proposed adoption of the *Pfizer* categorization of the countries is a "fair and reasonable and workable solution to a complex problem of this kind." (Conf. Hrg. Tr., 7/1/99 at 68) He noted two bases for his conclusion: first, that the *Pfizer* panel spent a considerable amount of time discussing these issues with panel members who had many ideas, and second, on his 35 years' experience in teaching, researching, working, practicing law

in one form or another and writing about comparative methodology. (Conf. Hrg. Tr., 7/1/99 at 69)

Mr. Ullstein testified that currently, there is no ongoing breast implant litigation in the United Kingdom for a number of reasons. Legal aid in the United Kingdom is difficult to obtain because a party must meet not only a means test, but must also satisfy a merits test and show that the cost benefit ratio is in that party's favor. (Conf. Hrg. Tr., 7/1/99 at 295) An individual who can pay for his/her own lawyer may bring litigation in the United Kingdom but generally only those who are very well off can afford litigation because of the cost to obtain experts. (Conf. Hrg. Tr., 7/1/99 at 296) In theory, conditional fees are available. However, Mr. Ullstein commented that because of the failed tobacco litigation which was handled on a conditional fee basis, a very large number of solicitors will carefully consider whether to accept substantial or difficult cases on a conditional fee basis. (Conf. Hrg. Tr., 7/1/99 at 297)

Mr. Ullstein further testified that juries are not available to hear personal injury claims. (Conf. Hrg. Tr., 7/1/99 at 301) He stated that there is a publication entitled *Guidelines for the Assessment of General Damages in Personal Injury Cases* which set out appropriate brackets for damages in various classes of injuries. Although the guidelines are not binding on the judges in the United Kingdom, the effect has been to standardize damages awards for any personal injury. The practicing English Bar knows that one starts with whatever the current figure is for quadriplegia and works down from that amount. (Conf. Hrg. Tr., 7/1/99 at 304) Punitive damages are not available in the United Kingdom. (Conf. Hrg. Tr., 7/1/99 at 310) Ullstein

opined that a breast implant claimant would have a combination of difficulties in the United Kingdom, including scientific proof, the relatively low awards for cases of this nature, and the cost benefit ratio to the claimant would not be met. (Conf. Hrg. Tr., 7/1/99 at 308-309) Mr. Ullstein concluded that the settlement offer to the claimants in the United Kingdom is fair and reasonable, given the impediments to a successful prosecution of breast implant claims in the United Kingdom. (Conf. Hrg. Tr., 7/1/99 at 311) Mr. Ullstein also testified that similar factors are involved in prosecuting cases in the Netherlands, Germany and South Africa. Mr. Ullstein concluded that based on his knowledge of the systems in these countries and in his work on the *Pfizer* panel, the settlement offers under the Joint Plan are fair and reasonable on these foreign claimants. (Conf. Hrg. Tr., 7/1/99 at 322-327)

Professor Luntz, a leading expert on Australian tort law, has written a book entitled *Assessment of Damages for Personal Injury and Death*, currently being revised for its 4th edition. He cited eight reasons why damage awards are lower in Australia than in America, including: 1) cultural differences; 2) the availability of social security and universal health care benefits in Australia; 3) the difficulty in accessing the courts and the lack of a contingency fee system in Australia; 4) the cost rules in Australia which are a significant deterrent to plaintiffs; 5) bench trials in product liability cases and lack of jury trial in Australia; 6) strict liability is less frequently available; 7) actual damage awards are lower in Australia because of various factors, including maximum awards for non-pecuniary loss, the appellate courts have greater powers to limit awards, loss of earnings are assessed on an after tax basis, and medical costs are paid by and

reimbursed to the government; and 8) punitive damages are hardly ever available and in the last 30 years, only 40 cases allowing punitive damages have been upheld by the appellate courts. (Conf. Hrg. Tr., 7/2/99 at 62-76) Based on these factors, Professor Luntz offered the opinion that settlement offers to the Australian claimant should be discounted by at least 40% of U.S. values. (Conf. Hrg. Tr., 7/2/99 at 76-77)

Professor Luntz also testified that the New Zealand claims should be discounted in the same fashion because New Zealand very often looks to Australia for guidance on award matters. (Conf. Hrg. Tr., 7/2/99 at 85) He stated that currently, in New Zealand, there is virtually no litigation because of legislation enacted in 1972 which became effective on April 1, 1974. (Conf. Hrg. Tr., 7/2/99 at 83, 85) Personal injury accident claims are disposed of administratively by the Compensation Commission. (Conf. Hrg. Tr., 7/2/99 at 83-84) A claim falling outside the definition of personal injury by accident, is governed by ordinary negligence principles and a lawsuit is permitted. Since the legislation came into force in 1974, there have been no damage recoveries. (Conf. Hrg. Tr., 7/2/99 at 84) Luntz also noted that exemplary or punitive damages, although recoverable under the Accident Compensation Act, are very moderate with the guideline of approximately $50,000 New Zealand dollars maximum. (Conf. Hrg. Tr., 7/2/99 at 85) Professor Luntz opined that because there is virtually no litigation in New Zealand, the 60% rate offered to the New Zealand Claimants is a very favorable settlement. (Conf. Hrg. Tr., 7/2/99 at 85)

The Bankruptcy Court found the Proponents' witnesses credible and that the foreign objectors failed to cast doubt upon their testimonies after long hours of cross-

examination. *Classification and Treatment Op.*, 244 B.R. at 660. The Bankruptcy Court found the Objectors' witnesses unhelpful. *Id.*

The Australian Claimants called Professor David Partlett as a witness. Professor Partlett, originally from Australia, was the principal law reform officer of the Australian Law Reform Commission and taught at the Australian National University in Canberra, Australia for nine years. He has been a professor of law at Vanderbilt University Law School for the past 14 years and has taught advanced torts and remedies, comparative law and health law. Professor Partlett has published books and articles in the areas of professional negligence, child mental health and the law, medical malpractice, punitive damages and repressed memories. *Classification and Treatment Op.*, 244 B.R. at 661 n.20; Australian Claimants' Ex. 1, *curriculum vitae* for Mr. Partlett; Conf. Hrg. Tr., 7/14/99 at 151-56.

Professor Partlett testified that the 60% discounted settlement offer is based upon a false premise. He stated it is a myth that the American tort system is a very high paying, high quantum damage tort system, especially in the product liability area and a myth that Australians do not litigate to vindicate rights and interests. (Conf. Hrg. Tr., 7/14/99 at 177) He noted it is difficult to make comparisons to the United States law because tort law is local and awards vary from state to state. The level of compensatory and punitive damages awarded differs throughout the United States and product liability is confined to a very few products, such as pharmaceuticals, medical products, asbestos and automobiles. (Conf. Hrg. Tr., 7/14/99 at 178) On cross-examination, Professor Partlett testified that he has taught only one course

on comparative law, four years prior to his testimony. (Conf. Hrg. Tr., 7/14/99 at 210) He was not aware of any award of punitive damages in any product liability case in Australia. (Conf. Hrg. Tr., 7/14/99 at 222) Partlett agreed that the High Court in Australia clearly indicated that punitive damages, when awarded, are to be awarded only in moderation, and that punitive damages awards in Australia are less than those in the United States. (Conf. Hrg. Tr., 7/14/99 at 224, 226) Professor Partlett also agreed that it is common practice in the United States to fund products liability litigation through contingency fee arrangements and that attorneys in Australia cannot contract for attorney fees as a percentage of an anticipated recovery. (Conf. Hrg. Tr., 7/14/99 at 226) Regarding jury trials, Professor Partlett supported the Proponents' position that jury trials in tort cases are much less common in Australia than in America. (Conf. Hrg. Tr., 7/14/99 at 231) Professor Partlett admitted that a 1988 law journal article he co-authored entitled "An America's Cup for Tort Reform?" stated that incentives to litigate in Australia are suppressed because contingency fees are unethical and the losing litigants must bear part of the successful party's costs, including attorney fees, that juries are relatively rare, that Australian courts have been reluctant to ease the burden of proof, that punitive exemplary damages are available only for intentional torts, that on the cultural level the vindication of rights through litigation is not ingrained in Australian attitudes, and described Australia as a "defendant's pleasure dome." (Conf. Hrg. Tr., 7/14/99 at 242-243)

The Shainwald Claimants presented the testimony of Edward Kellogg. Mr. Kellogg has an M.B.A. and J.D. degree and is a practicing lawyer in Atlanta, Georgia concentrating in pharmaceutical products liability cases. He

has handled cases in about a dozen different states and is a barrister in England. *Classification and Treatment Op.*, 244 B.R. at 661 n.19; Conf. Hrg. Tr., 7//15/99 at 13-14. Mr. Kellogg testified that the settlement offer made to United Kingdom Claimants is not fair because the reasons advanced in favor of the discrepancies between the settlement offers are wrong, severely exaggerated, or irrelevant. (Conf. Hrg. Tr., 7/14/99 at 21) He stated that the basis for the difference in the payments is the outcome of the cases between the American and English cases which fails to take into account that the differences between American venues are oftentimes larger than the differences between any given American venue and the English practice. (Conf. Hrg. Tr., 7/14/99 at 22) It is his view that the social security benefits are not so generous in England and that there is no substantial difference between the benefits awarded in England and the benefits awarded in the United States which are also not generous. (Conf. Hrg. Tr., 7/14/99 at 24) Mr. Kellogg testified that the unavailability of punitive damages in the English practice is irrelevant because, in most instances, punitive damages are not available in the United States either. (Conf. Hrg. Tr., 7/14/99 at 27)

On cross-examination, Mr. Kellogg admitted that he became a barrister in 1993 and was in England for approximately one year and three months, during which he was a pupil for the first 12 months, that being equivalent to being a summer law clerk in the United States. (Conf. Hrg. Tr., 7/14/99 at 86) He had never been a lead attorney on any case and had never tried a products liability case in England. (Conf. Hrg. Tr., 7/14/99 at 87) After the one year and three month period, Mr. Kellogg came back to the United States and has never practiced in England as a barrister since that time. (Conf. Hrg. Tr., 7/14/99 at 88) He admitted that in

comparing relative verdict values in England to the United States, he had asked an attorney for one of the party's in this case to gather information and performed no independent review of verdicts in England. (Conf. Hrg. Tr., 7/14/99 at 92) The Bankruptcy Court noted Mr. Kellogg's minimal knowledge of average recovery amounts in the English tort system and found that implicit within his testimony was an acknowledgment that tort values in the United States do indeed tend to be considerably higher than those in England. *Classification and Treatment Op.*, 244 B.R. at 660-661; Conf. Hrg. Tr., 7/14/99 at 94-103.

Based on the testimony and evidence before the Bankruptcy Court, there is sufficient evidence to support the conclusion that the foreign claimants were properly classified apart from domestic claimants. The Bankruptcy Court did not clearly err in its findings that the evidence on the record shows that tort recoveries in the United States tend to be significantly higher than those in foreign jurisdictions and that it is appropriate to differentiate between categories of foreign claimants on this basis. *Classification and Treatment Op.*, 244 B.R. at 661. Its decision is further supported by case law demonstrating the attractiveness of American courts to foreign plaintiffs. *Id.* (citing, among others, *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 252 & n.18 (observing that American courts are very attractive to foreign plaintiffs)); *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1235 (3rd Cir. 1995). The record below shows that, based on a number of factors, including the amount of tort recoveries, the culture, the availability of social security and universal healthcare, the spending powers of the countries, and the tort and legal systems, classification of claims of the domestic breast

implant claimants from the foreign breast implant claimants is reasonable and legitimate.

Further classification of the foreign breast implant claimants into Classes 6.1 and 6.2 is also reasonable and legitimate based on the record. Testimony showed that the classification as between the foreign claimants was based on: a review of numerous tort and legal systems; the basic principles that applied to the lead countries; and various economic factors. The record shows that the categorization of countries is a fair and reasonable and workable solution to a complex problem based on the work of the *Pfizer* panel. The *Pfizer* panel, equipped with experience in teaching, research, extensive law practices and comparative methodology, spent a considerable amount of time discussing these issues. The *Pfizer* panel obtained sufficient data for many of the lead countries in Class 6.1. The data on the "lesser" developed countries now in Class 6.2 was difficult to find. However, the testimony indicates that settlement offers (based on percentages of settlement offers to domestic breast implant claimants) in both Classes 6.1 and 6.2 are much more generous than those offered in the *Pfizer* plan.

Some foreign claimants object that they were placed in the wrong class based on GDPs or the type of legal system available to them. The evidence before the Bankruptcy Court was that the Class 6.1 countries collectively averaged 73% of the United States' per capita GDP, whereas the per capita GDP of the Class 6.2 countries averaged 18% of the United States' per capita GDP. The testimony shows that the *Pfizer* panel discussed at length the categorizations of the countries and, based on their collective experience, determined that the countries in categories 3 and 4 should receive lower

settlement offers than those countries in categories 1 and 2. The testimony further shows that some countries were placed in Class 6.1 even though their GDP is less than 60% of the U.S. GDP because of their membership in and their economic ties with the European Union. One example is Greece which has adopted the EC Product Liability Directive which gives consumers throughout most of Europe certain uniform protections not available in most countries in Class 6.2. *See* Patrick Kelly & Rebecca Atree (eds.), *European Product Liabilities* 11 (1997). Given the lack of specific data regarding tort claim values, especially in those countries in Class 6.2, other data, including the GDP data and other economic factors, had to be considered in a general way. The Proponents admit that some countries may not perfectly fit into a class as the foreign claimants have asserted. They note that § 1122(a) does not require perfection in classification, but by its terms, merely requires that claims in the same class must be "substantially similar." Similarity is judged not by comparing claims to each other, but by assessing the relationship of the claims within each class *vis a vis* the Debtor and its assets. There is no requirement that each country must have its own respective class. The classification of the foreign claimants into two classes is supported by the record and the Bankruptcy Court did not clearly err in its finding.

Although this Court may not have classified the foreign claimants as the Joint Plan has done, it is not the Court's prerogative to do so under the Code. This Court does not subscribe to any form of discrimination in classification such as "Eurocentric discrimination" as some foreign claimants have suggested the Joint Plan has done. The Court notes that the use of categorizations such as "first," "second,"

or "third" world countries or "more" or "less" developed countries may connote that a certain country and its people have less value and importance compared to others and has attempted to use such words sparingly. However, the Proponents have shown that verdict amounts, economic, cultural and legal differences between the countries support separate classifications of the foreign claimants in this case.

The foreign claimants object to the use of the *Pfizer* panel findings claiming that the methodology in *Pfizer* should not be followed because it was not a bankruptcy case. The foreign claimants argue there is no basis for treating foreign and domestic claimants differently citing other bankruptcy cases which treat foreign and domestic claimants the same. First, the foreign claimants cite the *Manville* bankruptcy case to support their argument that different payment levels should not be used. The *Manville* plan of reorganization did not specify differing payment levels between foreign and domestic claimants. The Proponents note that the claims resolution procedures in the *Manville* case eventually had to consider values in different jurisdictions, including foreign jurisdictions, in formulating settlement offers. *See In re Joint Eastern and Southern Dist. Asbestos Litig.* , 878 F.Supp. 473, 583 (E.&S.D. N.Y. 1995)(Stipulation of Settlement, Ex. A, ¶ C.I. Trust Distribution Process, ¶ C.I), *aff'd in part, vacated and remanded in part on other grounds*, 78 F.3d 764 (2d Cir. 1996).

The foreign claimants also rely on *Robins* to support their argument that foreign and domestic claimants should be treated equally. Professor Georgene Vairo, the chairperson of the Dalkon Shield Claimants Trust, testified that the trustees in *Robins* knew that the value of foreign claims was lower

than domestic claims but elected to offer equivalent settlements to both domestic and foreign claimants. (Conf. Hrg. Tr., 6/30/99 at 133, 157) The trustees chose to offer equal settlements because the number of foreign claims was relatively low and the delays in structuring different settlement amounts for foreign claimants could have spawned other litigation and caused additional delays for all claimants. (Conf. Hrg. Tr., 6/30/99 at 127-128, 131-132, 154-157, 246)

The foreign claimants suggest that the Foreign Settlement Program ("FSP") approved in the MDL-926 breast implant litigation provides equal benefits to both domestic and foreign claimants. However, Mr. Tommy Jacks testified that the foreign claimants who registered in the MDL before 1995 could receive compensation for disease claims but were ineligible for rupture compensation available to domestic claimants. (Conf. Hrg. Tr., 6/28/99 at 151-154) The proofs show that the FSP pays $10,000-50,000 to foreign claimants with ruptures, while the Revised Settlement Program ("RSP") pays domestic claimants $25,000-100,000 for the same conditions. Foreign claimants are not eligible to receive the RSP's Long-Term Benefit Program which allows domestic claimants the highest level of settlement payments of $75,000-$250,000. A foreign non-current claimant could qualify for a maximum benefit of $3,500 for disease payment. The foreign claimants' argument with respect to the treatment under the RSP is without merit.

There is no authority for the argument that settlement offers in bankruptcy actions must be structured like the *Robins* case nor for the argument that settlement offers should not be patterned after non-bankruptcy mass tort cases. Settlement offers should be based on the factual circumstances

of each bankruptcy case, taking into account the status of the Debtor's assets including, the number of creditors involved, the type of claims involved, the number of unliquidated claims involved, whether it involves a mass tort scenario, and if the individual claimants who have personal injury claims are in the United States or from another country. The Proponents' use of the *Pfizer* model was appropriate since that case involved a mass tort class action settlement proceeding. In a class action, a court must hold a hearing to determine whether a settlement is fair, reasonable and adequate. The Second Circuit has held that a court, in a class action setting, acts as a fiduciary for the absent class members to assure all class members receive fair and equitable treatment. *See Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1078 (2d Cir. 1995). In a bankruptcy action, the bankruptcy court must determine whether the proposed plan meets all the statutory requirements, including whether the claimants are properly classified, whether the claimants are treated fairly within the class, whether the plan is proposed in good faith and whether the plan is in the best interests of the creditors. 11 U.S.C. §§ 1122(a), 1123(a)(4), 1129(a)(3), and 1129(a)(7). The Bankruptcy Court's finding that the classifications of the foreign breast implant claimants is supported by the record.

2.Good Faith

Some foreign claimants argue that the requirements under § 1129(a)(3) have not been met because the Joint Plan was not proposed in good faith. Specifically, the foreign claimants argue that the Tort Claimants' Committee violated its fiduciary duty to negotiate on behalf of the Foreign Claimants, turning their backs on these claimants in favor of

receiving higher compensation levels for domestic claimants. The foreign claimants have not presented any evidence to support their allegations of bad faith negotiations on behalf of the Foreign Claimants. The Proponents admit that the domestic claimants are scheduled at a higher compensation level than provided in previous plans proposed by the Debtor, but the Proponents state that the Joint Plan now provides substantially larger recoveries for *all* tort claimants. The previous plan submitted by the Debtor provided $450 million (NPV) less in overall funding to resolve the tort claims than the current Joint Plan. The current negotiated plan offers other enhancements for the foreign claimants, including foreign-based claims centers in Europe and South America. The current Joint Plan also provides mechanisms to process claims in a claimant's own language. Other provisions in the Joint Plan includes allowing Class 6.1 claimants the option to receive their payment in local currency, providing a foreign representative on the Claimants Advisory Committee, and offering additional settlement options to Class 6.2 claimants. *See* Settlement Facility and Fund Distribution Agreement, Art. 4.

The foreign claimants argue that the Joint Plan was not proposed in good faith and that the Tort Claimants' Committee breached its fiduciary duty to the foreign claimants because it took opposing positions regarding the foreign claimants' settlement formulas. Originally, the TCC opposed the 60% and 35% settlement formulas currently in the Joint Plan. The Committee eventually agreed to the percentage rate on behalf of the foreign claimants. Mr. Tommy Jacks testified at the hearing that the independently negotiated settlements with the foreign claimants in Canada and Australia, as provided in Classes 6A-6D of the Plan, played a major role

in setting themarket value of the general foreign breast implant claims. (Conf. Hrg. Tr., 6/28/99 at 198-99) The same formulas are used in the negotiated settlements with the foreign claimants in Classes 6A-6D and Classes 6.1 and 6.2. *Id.* Based on the record before the Bankruptcy Court, there is nothing to show that the Tort Claimants' Committee breached its fiduciary duties to the Foreign Claimants.

The foreign claimants also maintain that because the Debtor's shareholders will retain their equity interests, the Joint Plan was not proposed in good faith. The foreign claimants appear to argue that the underlying reason for the settlement offers to the foreign claimants at the 60% or 35% rate is the desire of the Shareholders to retain their equity interests. This argument is without merit based on the Bankruptcy Court's finding that all tort claimants, including the foreign claimants, would be paid full under the Joint Plan, whether the claimants choose to settle or to litigate their claims. *Best-Interests Opinion,* 244 B.R. at 722-23. Moreover, the foreign claimants do not have to choose the settlement offer but may elect to litigate and, based on the evidence at the hearing, their claim in the Litigation Facility would be paid in full.

3. Best-Interest

The Court has found that the Bankruptcy Court did not clearly err in its finding that the Joint Plan meets the best-interests-of-creditors test with respect to all claimants, including the Foreign Claimants. The Foreign Claimants argue that a chapter 7 trustee would owe no duty to the Debtor or its Shareholders; that liquidation would produce greater value than a going business concern; and that the

Foreign Claimants would therefore receive more in a chapter 7 liquidation than under the Joint Plan because the settlement offers to the Foreign Claimants would not be discounted.

A chapter 7 trustee's fiduciary duty goes to both the creditors and the debtor in order to maximize the value of the estate. *Myers v. Martin (In re Martin)*, 91 F.3d 389, 394 (3rd Cir. 1996). The Foreign Claimants have provided no evidence to rebut the Proponents' expert, Mr. Arthur Newman, who testified that using a liquidation analysis, the creditors under the Joint Plan would receive at least as much as they would in a chapter 7 liquidation. The Foreign Claimants attempted to discount Mr. Newman's testimony by stating that he has not been a chapter 7 trustee or handled a chapter 7 case. Mr. Newman testified that the chapter 7 analysis prepared for this case is similar to the analysis used in the chapter 11 cases in which he has been involved and that those analysis have incorporated consultations with chapter 7 trustees, counsel and other professionals. (Conf. Hrg. Tr., 7/14/99 at 71) Mr. Newman's testimony was not sufficiently rebutted. A chapter 7 trustee has a duty to contest claims based upon all available defenses. *Golfland Entertainment Centers, Inc. v.Peak Inv., Inc. (In re BCD Corp.)*, 119 F.3d 852, 859 (10th Cir. 1997). Based on the evidence before the Bankruptcy Court, the Proponents presented sufficient evidence to support the Bankruptcy Court's finding that the Proponents have met the best-interests-of-creditors test under 11 U.S.C. § 1129(a)(7). Under a clearly erroneous standard of review, the Bankruptcy Court did not clearly err in its findings that the Proponents met the best-interests test.

4. Constitutional Violations

The Shainwald and Australian Foreign Claimants contend that their due process rights have been violated under the Fifth Amendment of the United States Constitution because of the Joint 126 Plan's classification and treatment of their claims. (Shainwald Br. at 35; Australian Br. at 21-24) The Bankruptcy Court did not address the constitutional issue in any of its opinions relating to the Confirmation Order. The Australian Claimants did not raise this objection before the Bankruptcy Court. The Shainwald Appellants only footnoted the constitutional issue. Neither argued the constitutional issues during the confirmation hearing. The Appellants have waived their constitutional objections to the Joint Plan because these issues were not raised before the Bankruptcy Court. *Taft Broadcasting Co. v. United States*, 929 F.2d 240, 243 (6th Cir. 1991). The Appellants have cited no authority that a bankruptcy court or any court's approval of an order establishes a governmental action. A governmental action is required to state a constitutional claim and a "mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the government responsible for those initiatives." *Blum v. Yaretscky*, 457 U.S. 992, 1002, 1004 (1982).

To claim deprivation of due process under the Fifth Amendment, Appellants must identify a possessory interest in receiving a settlement offer from the Debtor or the right to litigate their claim in a forum of their choice. *See e.g., Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 459 (1989). As the Bankruptcy Court noted, "[a] settlement is a private agreement voluntarily reached between parties." *Classification and Treatment Op.*, 244 B.R. at 664. The

foreign claimants may choose to either settle or litigate their claims. The foreign claimants have not shown that they have a constitutional right to a settlement offer. The Joint Plan does not deprive any claimant of the right to litigate any of their claims through the Litigation Facility.

The Appellants' equal protection claim under the Fifth Amendment, based on their claim that they are being treated differently than domestic breast implant claimants, also fails. The Supreme Court has consistently held that there is a legitimate distinction between aliens and citizens or residents which may justify attributes and benefits for one class not accorded to the other. *Mathews v. Diaz*, 426 U.S. 67, 78 (1976). *See, also, Piper*, 454 U.S. at 253, 256 (there is a distinction between resident or citizen plaintiffs and foreign plaintiffs, such that a foreign plaintiff's choice of forum deserves less deference than that of a resident or citizen plaintiff.)

5. New Zealand Claimants/Forum non conveniens

The New Zealand Claimants' argument that their claims are not substantially similar to other Foreign Claims in Class 6.1 is based on the *Ashley* decision of the MDL-926 court. The New Zealand Claimants contend that their claims have survived a *forum non conveniens* motion and they would be able to pursue their claims in the U.S. courts. In this manner, they are not substantially similar to other foreign claimants who may be barred by *forum non conveniens* from pursuing claims in the U.S. courts. The New Zealand Claimants assert that because they have access to the U.S. courts they are no differently situated than domestic claimants

and being in Class 6.1. The Proponents' comparisons of legal systems and substantive rights are of no moment to them as they claim they have the same legal rights as domestic claimants. In addition, New Zealand Claimants assert that their claims are more valuable than other Class 6.1 claims and they have therefore given up more consideration for equal treatment in Class 6.1. Neither the Bankruptcy Court's opinion nor the New Zealand Claimants' argument settles the question of what the outcome of a choice of law motion will be or whether additional New Zealand Claimants will survive a new *forum non conveniens* motion, assuming that the *Ashley* decision secured a U.S. forum for certain New Zealand Claimants. (The New Zealand Claimants' argument is really not a classification issue but a question of whether their claims will ultimately be dismissed in the United States courts on *forum non conveniens* grounds.) This issue rises or falls on whether the New Zealand Claimants' claims are subject to dismissal on *forum non conveniens* grounds and, if not, whether the same analysis used for other foreign claimants should apply to them. In its opinion, the Bankruptcy Court found that most, if not all of the foreign claims would likely be subject to *forum non conveniens* dismissal and that the 40 New Zealand claims which survived dismissal without prejudice pending further evidence to be submitted in *Ashley* did not support a separate classification of the New Zealand Claimants from other foreign claimants under the Plan. The Bankruptcy Court reasoned that other hurdles, such as the choice of law issues, would still face the New Zealand Claimants even if they were allowed to litigate their claims in the United States. The Bankruptcy Court examined Michigan's choice of law provisions concluding that the laws in a foreign claimant's home state would likely apply to a foreign claimant's case if the case is not dismissed on *forum*

non conveniens grounds. *Classification and Treatment Op.*, 244 B.R. at 662.

The *forum non conveniens* and the choice of law issues will be addressed by the District Court if the claimants choose to elect litigation. As this Court has noted previously, the classification question deals with whether the claims are substantially similar in legal and factual nature as against the Debtor. The Bankruptcy Court did not clearly err in finding that New Zealand was properly classified with other foreign claimants in Class 6.1.

6. Shainwald Appellants

In addition to the issues already addressed above, the Shainwald Appellants raise several other issues on appeal. The Shainwald Appellants claim that the Debtor engaged in gerrymandering when the countries were misclassified. The Shainwald Appellants present no evidence other than their conclusory allegations that the Proponents engaged in manipulating the classification of the countries in order to receive favorable votes.

The Shainwald Appellants argue that the Bankruptcy Court erred when it found that the 513 Mexican and Vietnamese Claimants accepted a Plan Modification in writing pursuant to Bankruptcy Rule 3019. The Mexican and Vietnamese claimants, classified in Class 6.2, originally voted to reject the Joint Plan. On July 28, 1999, these Claimants, through counsel, changed their votes converting their vote to an accepting class. The Shainwald Appellants argue that each Mexican and Vietnamese claimant should have provided in writing their change of vote accepting the Joint Plan with the

modification to increase the payment to Class 6.2 claimants in the amount of $600 instead of a writing from their attorneys. The Shainwald Appellants have pointed to no authority requiring each individual claimant to submit a writing to accept a plan modification. Rule 3019 only indicates that a claimant may accept a plan modification in writing. Rule 3019 does not require each individual claimant to accept a plan modification nor does it preclude the claimant's attorney to accept a plan modification on behalf of a client. Parties are bound by the acts and omissions of their counsel. *United States v. Johnson*, 752 F.2d 206, 210-11 (6th Cir. 1985). Rule 3018(c) further states that "[a]n acceptance or rejection shall be in writing, identify the plan or plans accepted or rejected, be signed by the creditor ... or an authorized agent, and conform to the appropriate Official Form."

The Shainwald Appellants do not represent the individual Mexican and Vietnamese Claimants nor have the Mexican and Vietnamese Claimants appealed the Confirmation Order. The Shainwald Appellants have submitted no evidence that the individual Mexican and Vietnamese Claimants did not agree with nor give their lawyers the authority to act on their behalf in accepting the modification of the plan. The Bankruptcy Court did not err in its finding that the Mexican and Vietnamese claimants' acceptance of the modification of the plan, submitted in writing on their behalf by their attorneys, constituted a proper acceptance, thereby changing Class 6.2 to an accepting class.

The Shainwald Appellants also argue that the Bankruptcy Court erred in denying the Korean Claimants' motion to change their 1,721 accepting votes in Class 6.2 to rejecting votes. The Bankruptcy Court found that the Korean

Claimants did not show cause under Bankruptcy Rule 3018(a) why their vote should be changed. Although the Korean Claimants filed an interlocutory appeal to the Bankruptcy Court's denial of their motion to change their vote and also filed an appeal to the Confirmation Order beyond the appeal period, no briefs have been filed on appeal, despite this Court's order setting a briefing deadline of February 18, 2000 for all appeals relating to the Confirmation Order. The Shainwald Appellants do not represent the Korean Claimants. The Shainwald Claimants argue that the Korean Claimants made two mistakes when they submitted accepting votes in May 1999. The first mistake was that they believed as a condition for the accepting votes, they could continue to argue their objections to the Joint Plan. Because the Bankruptcy Court deferred its ruling on this issue until after the Korean Claimants fully participated at the confirmation hearings, this argument is moot since the Korean Claimants were able to place their objections on the record despite having accepted the Joint Plan. The second mistake was that the Korean Claimants believed that they would be able to raise objections to confirmation under the cram down provision of 11 U.S.C. § 1129(b). When the Mexican and Vietnamese Claimants accepted the Plan with certain modifications on July 28, 1999, the Korean Claimants were precluded from raising a Section 1129(b) objection since Class 6.2 then became an accepting class and Section 1129(b) only applies to a rejecting class. At the time when the Korean C[illegible]mants cast their accepting 1,721 votes in May 1999, their § 1129(b) argument was not available to them since at that time, no one had reason to believe that Class 6.2 would not be an accepting class. The Korean Claimants could not have anticipated at the time of voting that they would have a § 1129(b) argument given that they cast their 1,721 votes in favor of the Joint Plan which

would indicate that with that amount of votes Class 6.2 could have been an accepting class. The Bankruptcy Court did not err in its ruling that the Korean Claimants had failed to show cause under Bankruptcy Rule 3018(a) why their votes should be changed from accepting votes to rejecting votes.

The Shainwald Appellants argue that Paragraph 5.12 of the Joint Plan violates certain Friendship, Commerce and Navigation Treaties (the "FCN Treaties") because the manager of the Litigation Facility has the discretion to seek dismissal of Foreign Claims, but not Domestic Claims, under the *forum non conveniens* doctrine. The Shainwald Appellants contend that the difference in the treatment is unequal treatment and violates the FCN Treaties. The FCN Treaties state that "Nationals and companies of either Party shall be accorded national treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the Other Party." *Classification and Treatment Op.*, 244 B.R. at 657, quoting from the FCN treaty between The Netherlands and the United States. The Shainwald Appellants argue that the FCN Treaties essentially overturn the Supreme Court's decision in *Piper Aircraft*. In *Piper Aircraft*, the Supreme Court held that a foreign plaintiff's case may be dismissed based on *forum non conveniens* ground if certain factors are met, even though the law in another forum is less favorable to the plaintiff's chance of recovery. The Supreme Court noted that there is a distinction between resident or citizen plaintiffs and foreign plaintiffs, such that a foreign plaintiff's choice of forum deserves less deference than that of a resident or citizen plaintiff. *Piper Aircraft,* 454 U.S. at 250-52, 253, 256. The Bankruptcy Court found that the Shainwald Appellants' argument was without merit. The Bankruptcy Court stated

that because of the FCN treaties, a district court may be compelled to apply the same standards and factors that would apply to a similar motion made against a domestic claimant. *Classification and Treatment Op.*, 244 B.R. at 663. The treaties do not suggest that a court is precluded from considering and granting a motion to dismiss based on *forum non conveniens*. *Id.*

The Court agrees with the Bankruptcy Court's rationale on this issue. The FCN treaties afford the foreign party equal access to the courts only. The FCN treaties do not preclude a court from dismissing a foreign claim based on substantive law such as the *forum non conveniens* doctrine. If a domestic plaintiff was faced with a *forum non conveniens* motion in a court, that court is not barred from dismissing that plaintiff's case just because the plaintiff is from another state. As noted in *Piper*, the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient. *Id.* at 256. The FCN treaties do not preclude a court from considering any defenses a party may have to a claim against it, including a *forum non conveniens* defense. *See, e.g., Pacheco de Perez v. AT&T Co.*, 139 F.3d 1368, 1375 (11th Cir. 1998)(the FCN Treaty only creates a procedural right to access the court which is separate from the substantive cause of action.) The Shainwald Appellants have not cited any authority which holds that the FCN Treaties preclude a court from considering a *forum non conveniens* defense or that the FCT Treaties trump the Supreme Court's decision in *Piper*. The Shainwald Appellants' claim of unequal treatment between domestic and foreign claimants has no merit in light of the Supreme Court's statement in *Piper* that there is a distinction between resident or citizen plaintiffs and foreign plaintiffs and that "a foreign plaintiff's choice deserves less

deference." *Id.* at 255-56. The Bankruptcy Code specifically states that the district court in which the bankruptcy case is pending has the authority to set the trial venue of personal injury tort claims against the Debtor either in the district where the bankruptcy case is pending or where the claim arose. 28 U.S.C. § 157(b)(5). The Sixth Circuit expressly transferred all breast implant claims in the United States against the Shareholders to this district finding "related to" jurisdiction based on the chapter 11 case filed by the Debtor. *In re Dow Corning (Lindsey I)*, 86 F.3d at 490; *In re Dow Corning (Lindsey II)*, 113 F.3d at 572. The Bankruptcy Court did not err in its interpretation that the FCN Treaties do not preclude the manager of the Litigation Facility from seeking *forum non conveniens* dismissals on the foreign claims only.

The Shainwald Appellants claim that the Bankruptcy Court erred in excluding the testimony of Russell Levy and Robert Fiore, attorneys who represent foreign claimants from Britain and Germany, on the issue of whether the Plan is fair to their British and German clients under Class 6.1. The Shainwald Appellants note that the Bankruptcy Court allowed Ralph Knowles and Tommy Jacks, both attorneys who also represent claimants, to testify at the hearing. A trial court's decision to exclude an expert is reviewed under an abuse of discretion standard. *Morales v. American Honda Motor Co., Inc.*, 151 F.3d 500, 515 (6th Cir. 1998).

The Bankruptcy Court did not allow the two witnesses to testify for two reasons. The Bankruptcy Court first noted that these lawyers could not both represent their clients and act as witnesses on behalf of their clients. (Conf. Hrg. Tr., 6/17/99 at 176, 255) Secondly, the Bankruptcy Court excluded their testimony because of their financial interest in

the outcome of the confirmation hearing. (Conf. Hrg. Tr., 6/17/99 at 220, 258)

Lawyers who would be required to serve as witnesses in a proceeding were excluded under the rules of ethics from participating in the case in any way. *General Mills Supply Co. v. SCA Services, Inc.*, 697 F.2d 704, 715 (6th Cir. 1982). An attorney's testimony who represents a party in a proceeding may be discounted because the attorney is an interested party and lacks credibility.*TWM Mfg. Co., Inc. v. Dura Corp.*, 722 F.2d 1261, 1267 (6th Cir. 1983). The Bankruptcy Court did not abuse its discretion in not allowing the testimonies of Messrs. Levy and Fiore on the fairness issue based on the reasons stated on the record noted above. Although their testimonies may have had some relevance, their testimonies would have gone to credibility and weight instead of exclusion. However, because the Bankruptcy Court was the sole trier of fact, the decision not to allow the testimonies was not an abuse of discretion. As to Messrs. Knowles and Jacks' testimonies, Mr. Knowles was called without objection by the Shainwald Appellants as a witness and no one objected to Mr. Jacks' testimony regarding how the plan was negotiated and as to the meaning of certain Plan provisions.

7. The Australian Claimants

The three issues remaining specifically raised by the Australian Claimants which have not been addressed elsewhere in this opinion include: 1) the factors to be considered under *U.S. Truck*; 2) the Joint Plan's inclusion of U.S. citizen breast implant claimants in Class 5 as domestic claimants even though they did not receive their implants in the United States; and 3) the Joint Plan's two classes for

Australian Claimants under Classes 6.1 and 6D as violative of Sections 1123(a)(4) and 1129(a)(1).

The Australian Claimants argue that the factors to be considered to determine whether classification is proper under *U.S. Truck* are whether the claimants: 1) had a different stake in the "future viability" of the debtor, and 2) had "alternative means" at their disposal to protect their unsecured claims. *U.S. Truck*, 800 F.2d at 586.

A review of the Sixth Circuit's opinion indicates that these are not the "factors" to be considered in determining whether classification is proper. The future viability of the debtor and the alternative means issues are the *factual* basis for the separate classification and not the standard to be considered in a classification analysis. *U.S. Truck* stands for the proposition that although there is some limit to the classification of claims, the courts have "broad discretion to determine proper classification according to the factual circumstances of each individual case." *Id.*

The Australian Claimants argue that the Joint Plan's inclusion of claimants who are U.S. citizens, but received their breast implants outside the United States in Class 5 is in error. That argument is without merit. The Supreme Court has noted that there are distinctions between plaintiffs who are either citizens or residents of the United States and foreign plaintiffs who are not U.S. citizens. In *Piper*, the Supreme Court specifically noted the distinction between resident or citizen plaintiffs and foreign plaintiffs, holding that a foreign plaintiff's choice of forum deserves less deference than that of a resident or *citizen* plaintiff. *Piper,* 454 U.S. at 250-252, 253, 256.

The Australian Appellants' argument that the Joint Plan violates § 1123(a)(4) because the claimants in 6.1 are not receiving precisely the same treatment as the claimants in Class 6D is without merit. Class 6.1 is a separate class from Class 6D. Class 6D are those Australian Breast Implant Claimants who choose to receive the payment of their claims pursuant to the Australia Breast Implant Settlement Option. The Class 6D claims are paid in a manner which is generally consistent with the treatment of other Class 6.1 Claimants. Amended Joint Plan, § 5.8.1. The Australian Appellants' position is that the two classes receive different treatment. Specifically, the Australian Appellants assert that Class 6D's treatment differs from Class 6.1 because the Class 6D family member claims are deemed released under the Australian Breast Implant Settlement Option. The Australian Appellants do not argue that Classes 6.1 and 6D were misclassified or that the claims in Class 6D are not substantially similar to each other.

The Australian Appellants have not shown the classification of Class 6.1 separate from Class 6D does not comply with any other provisions of the Bankruptcy Code as required under 11 U.S.C. § 1129(a)(1). The cram down provisions under § 1129(b) do not apply since both Class 6.1 and Class 6D are accepting classes. The Bankruptcy Court noted that § 1123(a)(4) only applies to treatment of claims within the same class and, therefore, does not apply to the difference of treatment, if any, between Class 6.1 and Class 6D. *Classification and Treatment Op.*, 244 B.R. at 666. In any event, although § 1123(a)(4) requires that a plan provide the same treatment for each claim within a particular class, a holder of a particular claim can agree to a less favorable treatment. 11 U.S.C. § 1123(a)(4). This Court agrees with

the Bankruptcy Court that § 1123(a)(4) does not apply to the Australian Appellants' objections regarding the different treatment between Class 6.1 and Class 6D since § 1123(a)(4) only applies to within class claims. Nor does the cram down provision in § 1129(b) apply since both classes are accepting classes.

3. Class 9 Other Silicone Gel Implants

a. Karen L. Hustead

Class 9 consists of claimants who have silicone gel implants other than breast implants. Two claimants from Class 9 appealed the Bankruptcy Court's November 30, 1999 Confirmation Order. The two claimants' arguments will first be summarized followed by the Court's analysis of the parties' arguments.

Karen L. Hustead, a *pro se* non-breast implant claimant, asserts that the TCC breached its fiduciary duty by not investigating the underlying claims and issues pertaining to the non-breast implant claimants. She claims that the TCC is biased in favor of breast implant claimants. Hustead contends that the TCC's actions are in violation of the Bankruptcy Code and that the Plan cannot be confirmed because the TCC failed to adequately represent her.

Hustead received her first implant surgery around the age of 16 to correct birth defects. Hustead claims to have the same diseases as many breast implant claimants, including: polyneuropathy; connective tissue disorder; nerve damage and disfigurement to the face; cervical cod disorder; mild lymphadenopathy; prominence of lymphoid in both

orapharyngeal; chronic fatigue syndrome; irritable bowel syndrome; and myofascial pain and dysfunction. Hustead claims she relied on the TCC to represent her, but the TCC did not adequately represent her because her implants are not included in the disease grid. She claims she and other non-breast implant claimants are improperly classified.

b. Helene D. Schroeder

Helene D. Schroeder, an attorney, proceeding *pro se*, claims she suffers from a disease due to her silicone chin implant. She is a classified in Class 9. Like Hustead, Schroeder argues that the Plan discriminates against the recipients of other silicone implants by failing to include them on the disease grids applicable to breast implant claimants. Schroeder also claims that the Trustee failed to appoint a guardian for future claimants thus the Bankruptcy Court erred in confirming the Plan. She argues that the Bankruptcy Court further erred in approving the Plan because the funding of the Litigation Facility was based upon unfounded assumptions about the number of non-breast implant claimants who might elect to litigate.

Schroeder contends that the non-breast implant claimants are not entitled to compensation for diseases based upon the grids set forth in the Plan even though the Plan provides disease compensation for the recipients of saline breast implant claimants. Nor does the Plan provide any explantation payment for non-breast implant claimants. Schroeder claims that the Plan unfairly favors breast implant claimants because those breast implant claimants who also have other nonbreast implants are able to recover under both Class 5 and Class 9. She further claims that the classification

of non-breast implant claimants were gerrymandered and did not have the benefit of representation by unconflicted counsel. Schroeder claims that the TCC breached their fiduciary duties to the non-breast implant claimants by failing to conduct a reasonable inquiry into the nature and extent of the claims of the non-breast implant claimants and unfairly treated non-breast implant claimants.

c. Analysis re Class 9 Objections

The Bankruptcy Court did not address the Class 9 Objections in any of its opinions. However, the general issues presented by the Class 9 Objectors, such as classification, treatment and good faith issues, were addressed by the Bankruptcy Court in response to the objections raised by other parties.

The Joint Plan classifies all domestic tort claims based on the Debtor's medical products, other than breast implants, in Class 9. As in Class 5 (domestic breast implant claimants), Class 9 claimants are given the option to either litigate or settle. The Settlement Facility provides Class 9 claimants settlement options negotiated and agreed to between the Debtor and the Tort Claimants' Committee. Tort claimants in Class 9 voted in favor of the Amended Joint Plan by nearly 98 percent. The only two objectors from Class 9 appear to be Hustead and Schroeder.

The Court will now address the Class 9 Claimants' argument that the TCC is biased in favor of breast implant claimants because the Class 9 claims are not included in the disease grid and there is no explantation payment for non-breast implant claimants. The eight attorney members of the

Tort Claimants' Committee represented 132 claimants with Other Products Claims in Class 9. (Resp. of the TCC to Schroeder's Motions to Compel Disclosure and for Clarification and Reconsideration of Pre-Trial Order at 3, 8-9.) Settling Other Products Claimants will be paid out of a self-liquidating $36 million fund with payments offered which are significantly larger than those offered in the Debtor's previous plans submitted to the Bankruptcy Court. The Settlement Facility will have the authority to distribute the balance of the $36 million fund to the most seriously injured Class 9 claimants. Class 9 claimants are not included in the disease grid. The Tort Claimants' Committee could not establish a proper valuation for these types of claims because of the absence of settlement or verdict history comparable to that available in the breast implant litigation. The Class 9 Objectors have not sufficiently established that disease payments should be paid to Class 9 claimants who choose to settle. However, the Class 9 claimants have the opportunity to fully litigate the disease issue if they choose to litigate their claims instead of seeking payment from the Settlement Facility. The Class 9 claimants also have the opportunity to litigate the explantation cost issue should they choose not to settle based on the Settlement Facility's offers relating to Class 9 Claimants.

The Class 9 Objectors claim that the Tort Claimants' Committee was biased is not supported by the record. The Committee negotiated a higher settlement grid from the previous offers made by the Debtor. The issue of the make up of the Tort Claimants' Committee was previously resolved by appeal and there is nothing in the record to support a claim that the negotiating subcommittee breached any duty owed to any claimant. Another objection raised by the Class 9

Objectors is that the Bankruptcy Court erred in approving the Joint Plan because there is no appointed guardian for future claimants. This issue also goes to the U.S. Trustee's authority to appoint committees. There is no requirement under the Bankruptcy Code for the U.S. Trustee to appoint a "guardian" for future claimants. The Supreme Court's recent decision in *Ortiz* only applies to class actions and does not address the structure of bankruptcy committees and those committees' fiduciary obligation to the various creditors. *Ortiz*, 119 S.Ct. at 2311.

The Class 9 Objectors' claim that the Proponents engaged in gerrymandering the vote when they classified Class 9 separately from other tort claimants is not supported by the record. There is no evidence that the Class 9 claims are not substantially similar. They are all unsecured, disputed and unliquidated personal injury claims against the Debtor, based on the Debtor's silicone medical products, other than breast implants. Ninety-eight percent of the Class 9 claimants voted in favor of the Amended Joint Plan. If the percentage voting in favor of the Amended Joint Plan was substantially less than what the actual voting percentage was, then, perhaps the Class 9 Objectors would have a stronger argument. If the Class 9 Objectors were grouped with other personal injury claimants, then the 98% acceptance rate would have probably increased the voting percentages in other classes. The Class 9 Objectors have not sufficiently shown that the Proponents engaged in gerrymandering the votes when the other silicone implant claims where classified in Class 9.

The Class 9 Objectors also argue that the Joint Plan should not have been approved because the funding of the Litigation Facility was based on unfounded assumptions as to

how many nonbreast implant claimants might elect to litigate. There is sufficient testimony on the record to support the Bankruptcy Court's finding that the Litigation Facility is more than adequately funded as previously addressed above. The Class 9 Objectors have presented no credible evidence to support their claim that the Litigation Facility is not sufficiently funded nor have they submitted an alternative methodology to determine the number of non-breast implant claimants who might elect to litigate instead of settle.

4. Class 12 Claimants/Physicians' Committee/Hartley Physicians

The Physicians' Committee and physicians represented by Hartley Hampton, argue that the Amended Joint Plan does not provide physicians with equal treatment under § 1123(a)(4). They argue that the settlement option under the Joint Plan requires the physicians who have *both* reimbursement and direct claims against the Debtor to give up more consideration than those physicians who only have a reimbursement claim and no direct claim against the Debtor. The Physicians' Committee argue that the two types of claims differ in character, and that the approval of the Amended Joint Plan, with the classification of the claims all in one class, was in error, and in violation of § 1123(a)(4).

The Physician Claims are in Class 12. Class 12 includes claims by physicians arising out of the Debtor's medical products, including reimbursement claims, such as claims by physicians against the Debtor where the physicians may be found liable to implant plaintiffs, and direct tort claims against the Debtor by the physicians, such as loss of reputation, based on the Debtor's misrepresentation to the

physicians as to the safety of the Debtor's implant products. The Amended Joint Plan allows the physicians to choose between litigation and settlement. The settlement option is not a monetary option but provides the physicians protection, by way of releases (except for malpractice claims) obtained under the Joint Plan, on the physicians' behalf, from any Settling Personal Injury Claimants, and the Litigation Facility's obligation to cover certain claims made against settling physicians by Non-Settling Personal Injury Claimants. In exchange, the Settling Physicians must release all of their Class 12 claims, including any direct claim they may have against the Debtor. 91.4% of the claimants in Class 12 voted to accept the Plan. The Bankruptcy Court noted the uniqueness of these creditors/claimants and so recognized when the Bankruptcy Court approved an official committee to represent the interest of all the physician claimants. *Classification and Treatment Op.*, 244 B.R. at 665.

The Bankruptcy Court held that Class 12 was properly classified. *Classification and Treatment Op.*, 244 B.R. at 665. The only requirement regarding classification under § 1122(a) is whether the claims are substantially similar. As noted by the Bankruptcy Court, all physicians could potentially have both derivative and direct claims against the Debtor. *Id.* at 665-66. The Bankruptcy Court did not clearly err in its finding that both of the physicians' potential direct and derivative claims are properly classified in Class 12. The physician claims, whether direct or derivative, are nonpriority, unliquidated and disputed unsecured claims. All of the claims arise out of the physician's use of the Debtor's products–from the same action–the physician's use of the implants on the breast implant claimants.

Inasmuch as the physicians argue that their claims are receiving disparate treatment, in violation of § 1123(a)(4), the second half of the statute expressly allows for disparate treatment, so long as the class member agrees to a different treatment. If the physician claimant accepts the Class 12's settlement option, then the physician agrees to a different treatment than the physician claimant who chooses to litigate both the derivative and direct claims. The Bankruptcy Court did not err in its finding that there is no violation of § 1123(a)(4) by restricting the settlement option to those physicians who agree to give up all of their claims, including their direct claims against the Debtor.

5. Class 15 Claimants/United States

a. United States' Claims

The United States is designated in the category, Class 15, the Government Payors claims. Class 15 consists of claims filed by governments seeking to recover the costs of medical treatment that the governments either paid for or provided as a result of injuries allegedly caused by products manufactured by, or containing materials supplied by, the Debtor. *Class 15 Cram Down Opinion*, 244 B.R. at 708. Class 15 is composed of three claimants--the United States, the Canadian Provinces of Alberta and Manitoba. Alberta and Manitoba each filed one claim. The United States filed four claims on behalf of the Department of Defense (the "DOD"), the Department of Veteran's Affairs (the "VA"), the Indian Health Services Division of the Department of Health and Human Services (the "IHS"), and the Health Care Financing Administration (the "HCFA"). *Id.* at 709. The Canadian Class 15 creditors voted their two claims in favor of the

Amended Joint Plan but withdrew their two claims prior to Confirmation in favor of certain treatment that their claims will be afforded pursuant to the British Columbia Class Action Settlement Agreement (the "B.C. Agreement"). The United States voted its four claims against the Amended Joint Plan, which made Class 15 a rejecting class. The Proponents seek confirmation of the Amended Joint Plan pursuant to 11 U.S.C. § 1129(b)(1).

The Amended Joint Plan provides for Class 15 claims as follows:

> Unless a different treatment is agreed to by the Proponents and the affected Claimants, the Proponents shall seek to have the Class in Class[] 15 ... estimated for distribution on or before the Confirmation Date. The Estimated Amount of any such Claim will be paid ... by the Claims Administrator on, or as soon as practicable after, the Effective Date. If not estimated for distribution on or before the Confirmation Date, such Claims will be channeled to the Litigation Facility for purposes of Claim liquidation and paid (subject to the terms of the Settlement Facility Agreement and the Funding Payment Agreement) when Allowed.

Amended Joint Plan, § 5.13.5.

The United States bases its right to recover claims under the Medicare Secondary Payer ("MSP") statute, 42 U.S.C. § 1395y(b), and the Medical Care Recovery Act

("MCRA"), 42 U.S.C.§§ 2651-53. The MSP requires, in most cases, that available private insurance, including liability insurance, replace Medicare as the primary source of payment for medical care provided to Medicare beneficiaries. The United States is not required to prove tortious conduct by Dow Corning in order to recover under the MSP statute. The United States need only show that Dow Corning made or is required to make payments to or on behalf of a Medicare beneficiary. The United States may assert its MSP rights in a direct cause of action against the Debtor. 42 U.S.C. § 1395y(b)(2)(b); 42 C.F.R. §§ 411.21, 411.24(e), (g). The United States may recover double damages from Dow Corning, if it does not make appropriate arrangements to provide for payment of the United States' claims. 42 U.S.C. §§ 1395y(b)(3)(A), 1395y(b)(2)(B)(ii).

The MCRA allows the United States to recover from a tortiously liable third party those costs the United States incurred under federal programs sponsored by the DOD, VA, IHS and HCFA. Under the MCRA, the United States has a subrogation claim to the beneficiary's claim and a direct cause of action against Dow Corning. 42 U.S.C. § 2651(b).

The Plan Proponents have contested the validity of the United States' claims. The United States claims it has been unable to access the proof of claim information necessary to allow the United States to identify with certainty those Personal Injury Claimants who received medical care treatment from the United States or had their medical care paid for by the United States. The United States argues four grounds in support of the reversal of the Bankruptcy Court's November 30, 1999 Confirmation Order.

First, the Joint Plan does not "provide the same treatment for each claim or interest of [Class 15], unless the holder of a particular claim or interest agrees to a less favorable treatment" as required by 11 U.S.C. § 1123(a)(4). The United States claims that the Canadian Government Payors in Class 15 received more favorable treatment because of the B.C. Agreement. The Bankruptcy Court found that the Joint Plan provides "an approximate measure of equality" which the United States argues is not supported by the evidence. The United States argues that the treatment between the United States and the Canadian Government under the B.C. Agreement differs in three areas: 1) the identification of Government Payor Claims; 2) resolution of Government Payors Claims in relation to the related Personal Injury Claims; and 3) remedies available when the Government Payor Claims is not properly resolved.

As to the identification issue, the B.C. Agreement provides that the Settlement Class Member shall provide the Claims Administrator with notice of the Subrogation Claims. In contrast, the Joint Plan has no comparable provision and requires that the Government Payor provide the Claims Administrator with the identity of the Personal Injury Claimant, with sufficient particularity. The United States has been unable to identify these claimants because it has not been allowed access to the claim database. In addition, the notification provisions in the B.C. Agreement are more favorable to the Canadian Government Payor than those under the Joint Plan and the Confirmation Order. The Canadian Government Payor can remain passive during the settlement process. The Canadian Government Payor Claims are resolved before any payment is disbursed. The United States claims that it may not receive notification until 24 hours after

a settlement amount has been agreed to and payment is not delayed to the Personal Injury Claimant until the Government Payor claim is resolved. The United States argues that the notification procedure treats its claims differently from those of the Canadian Government Payors.

Under the resolution procedures, the B.C. Settlement Claims Administrator holds the amount payable in trust until the Claims Administrator receives instructions from both the Settlement Class Member and the third party that the Subrogation Claim has been resolved. Under the B.C. Agreement, there is coordination if a consensual resolution is not reached between the Personal Injury Claimant and the Debtor. The British Columbia Court shall adjudicate the dispute and give direction to the Claims Administrator regarding disposition of the Subrogation Claim notification provisions. There is no payment to the Personal Injury Claimant until after the dispute has been resolved and the Claims Administrator receives direction from the British Columbia Court. In contrast, the United States' claim will be tied up in the Litigation Facility while the Settlement Facility makes the payment without any procedure for resolution of the related claim.

The Canadian Government Payor is provided with two significant protections of their claims which are not provided under the Joint Plan. If there is no consensual settlement with the Government Payor, the dispute is sent to a local court for resolution of just the division issue. The Joint Plan has no procedure for resolving disputes because the Joint Plan does not contemplate such a joint resolution of the Personal Injury Claim and the related Government Payor Claim. The B.C. Agreement provides the Government Payor recourse against

Dow Corning if the Settling Personal Injury Claimant fails to notify the Claims Administrator of the Government Payor Claim. Under the Joint Plan, the Government Payor must pursue its remedies solely against the Personal Injury Claimant and not Dow Corning. The United States argues that its claims are being treated differently from those of the Canadian Government Payor because the United States does not have a remedy against Dow Corning.

Second, the United States claims that the Joint Plan is not "fair and equitable" to the dissenting Class 15 creditors as required by 11 U.S.C. § 1129(b)(1). The United States claims that under the MSP, there is no requirement that the United States must show existence or proof of tort liability against a third party in order for the United States to recover the payments on behalf of a Medicare beneficiary. If the Settlement Facility makes a payment to a Personal Injury Claimant, the United States is entitled to reimbursement. The Medicare beneficiary has the obligation to notify the United States of the settlement but the Claims Administrator also has an obligation to inquire from the beneficiary if the beneficiary is a Medicare beneficiary. The Joint Plan provides that once the Settlement Facility makes the payment, the right to recover from the Settlement Facility is "cut off." The United States claims this violates the "absolute priority" rule. This is inconsistent with the United States' rights under federal law. The United States' claim only remains with the Personal Injury Claimant.

Third, the Joint Plan does not comply with the requirement that it must have been "proposed in good faith and not by means forbidden by law" as required by 11 U.S.C. § 1129(a)(3). The United States argues that the Joint

Plan allows Dow Corning to avoid compliance with the requirements under the MSP and the MCRA. Both statutes provide the United States with a direct right to recover from Dow Corning. The Plan Proponents failed to propose the plan in good faith because the United States' claims are extinguished against the Debtor once the Settlement Facility makes a payment to the Settling Personal Injury Claimant.

Fourth, the United States argues that the Plan extinguishes the United States' claims against the Insurers and is not proposed in good fa[illegible]. The broad release and injunction provisions are contrary to law and are not in good faith. (The injunction issue is addressed in the injunction arguments regarding the December 21, 1999 opinion.)

In response, the Proponents claim that the United States' claims remain disputed and are limited to reimbursement benefits to as many as 15,049 (15,048 according to the Bankruptcy Court) separate and identified federal beneficiaries under the Class 5 Breast Implant Claimants. The United States' claims average approximately $2,500.00 per reimbursement. Giving the United States the full benefit of the doubt, its four claims add up to only a few million dollars, compared to the billions of dollars in total claims against the Debtor under the Joint Plan. This is the context within which the United States argues that it is oppressed under the Joint Plan. The Class 15 Claims were not estimated before the Confirmation Date. If Class 15 Claims are eventually allowed, the Proponents argue that the Litigation Facility will become exclusively liable for the Class 15 Claims. The United States' claims were the subject of summary judgment motions in the Bankruptcy Court. The Proponents claim that the United States cannot prove that

Dow Corning's products caused the specific injuries or conditions for which the MCRA Claimants paid or provided medical services. The Proponents argue that the United States' claims are treated the same as the Canadian claims and that the Canadian provinces have agreed to a different treatment. The Proponents claim that the treatment of all Class 15 Claims--those of foreign governments and the United States alike--is fundamentally the same. The Class 15 claimants can attempt to settle their claims with the Debtor and the personal injury claimants. If the claims are not settled, the claims are then channeled to the Litigation Facility where they will be paid from the settlement fund in full. The Proponents also argue that section 6.8 of the Amended Joint Plan will equally apply to all allowed Class 15 Claims to the extent that the claims purport to include notification, determination, and resolution of the rights requested by the United States. The Proponents assert that any perceived difference in treatment by the United States is solely a function of the agreements between the Canadian provinces and the Class 6C personal injury claimants under the B.C. Agreement and not a function of the Joint Plan's treatment of Class 15 Claims.

The Joint Plan provides that if Class 15 Claims remain in dispute and not estimated for distribution before the Confirmation Date, those claims will be channeled to the Litigation Facility for purposes of liquidation and payment. Amended Joint Plan, § 5.13.5. To date, the United States' Class 15 claims remain in dispute and not estimated for distribution.

The Bankruptcy Court found that the Canadian Provinces of Alberta and Manitoba have effectively agreed to

a different treatment from what the Amended Joint Plan provides by refraining from pursuing their claims in the Litigation Facility in favor of the treatment provided under the B.C. Agreement. *Class 15 Cram Down Opinion*, 244 at 709. For the reasons set forth below, the Court finds that the Bankruptcy Court has not erred in its conclusion that the United States' claims are not treated unequally from the B.C. Agreement.

b. Within-in Class 15 Treatment

The United States' § 1123(a)(4) argument is based on a comparison between the Amended Joint Plan and the B.C. Agreement. The United States first argues that the notice provisions provided in the Joint Plan are less favorable to the United States than those provided in the B.C. Agreement. Under the B.C. Agreement, the Canadian Breast Implant Claimant must serve notice to the Claims Administrator regarding any Canadian governmental interest in their settlement. The Amended Joint Plan does not require a settling personal injury claimant to notify the Claims Administrator regarding any governmental interest in their settlement. The United States next argues that the resolution procedure on disputed claims provides less favorable treatment under the Amended Joint Plan. The Amended Joint Plan provides that if the governmental entity and the underlying claimants resolve the distribution of any settlement then the Settlement Facility will abide by the agreement between the claimant and the governmental entity. Otherwise, the Amended Joint Plan provides that each governmental entity should resolve its reimbursement claim with the underlying claimant in accordance with that governmental's entity's laws. The B.C. Settlement Agreement provides that

the B.C. Claims Administrator hold the money in dispute until the claim is resolved in a British Columbia Court. The United States' third argument is that the remedies under the Amended Joint Plan and the B.C. Settlement Agreement are different because the B.C. Agreement provides recourse against the Debtor if a claimant fails to notify the B.C. Claims Administrator notice of the Government Payor claim whereas the United States does not have such a recourse against the Debtor when a claimant fails to provide notice of the United States' claim.

Regarding the notice provision argument, the Bankruptcy Court noted that there is a notice provision under the Settlement Facility Agreement allowing a governmental entity to submit to the Settlement Facility Claims Administrator a request for notification with respect to any resolution of a breast-implant claim for which it asserts a right of reimbursement. *Classification and Treatment Op.*, 244 B.R. at 672. The Bankruptcy Court found that the Settlement Facility Agreement's notice provision is no less favorable to the United States than the B.C. Agreement. *Id.* at 673.

The Court finds that the Bankruptcy Court did not err in its conclusion. Not only does the Settlement Facility Agreement provide for notice, the governmental entity will be able to access the claimants' identities once the confidentiality projections are lifted at Confirmation. *Id.* at 672-73. The notice to the claimants regarding loss of confidentiality will also contain a notice that they may have certain obligations to notify the Government of an intent to resolve their claim and that they should either notify the Government or the Claims Administrator that the United States may have a competing interest in the claim. *Id.* The United States' argument that the

notice provision is less favorable under the Amended Joint Plan because the breast implant claimant under the B.C. Agreement must provide notice to the B.C. Settlement Claims Administrator is unavailing given that once the confidentiality has been lifted, the United States will have access to the claimants' identity and the United States will then be able to access its files in order to compare the names with the disclosed claimants' names. *Id.* at 673. Under the B.C. Agreement, Alberta and Manitoba must wait until the claimants notify the B.C. Settlement Administrator as to whether there are government claims of reimbursement. The notice provision under the Amended Joint Plan does not provide less favorable treatment than the B.C. Agreement.

As to the resolution procedure argument under the settlement portion, the Court finds that the Amended Joint Plan does not provide less favorable treatment than the B.C. Settlement procedures. Both procedures provide that if the governmental entity settles its claim with the underlying claimant, then the Settlement Facility will abide by the resolution procedures agreed to by the government lienholders and the underlying claimants. If there is no settlement between the parties, the Amended Joint Plan provides that each governmental entity should resolve its reimbursement claim with its underlying claimants pursuant to that government's laws. The B.C. Agreement provides that the B.C. Claims Administrator hold the money until the claim is resolved in a British Columbia Court. A reading of the Amended Joint Plan indicates that it does not interpret the laws of any of the governmental entities in Class 15. The Amended Joint Plan provides that the Claims Administrator

will abide by the MDL Court's[14] interpretation of that government's procedures. The Amended Joint Plan also provides that the governmental entity may request an injunction if the settlement distribution is not settled.

The United States has not agreed to any settlement distribution agreement with the Debtor, unlike Alberta and Manitoba which have agreed to the settlement distribution procedure set forth in the B.C. Agreement. The Court finds that the Amended Joint Plan does not purport to interpret the United States' laws regarding settlement distribution but allows the United States to present its arguments to this Court, the reviewing Court over the Settlement Facility, for an interpretation as to the settlement distribution procedure to be used by the Claims Administrator. If the United States believes that its laws for settlement distribution are the same as the procedures set forth in the B.C. Agreement, then the United States can present its argument before this Court. The Amended Joint Plan does not preclude the United States from requesting the same procedures set forth in the B.C. Agreement. The Court finds that the Amended Joint Plan settlement distribution resolution procedures are not less favorable than the procedures set forth in the B.C. Agreement.

Addressing the United States' third argument on the treatment issue, the Court finds that this argument is

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[14] Since the retirement on April 3, 2000 of the Honorable Sam C. Pointer, the presiding judge of MDL-926, the undersigned now has the responsibility over the Settlement Facility pursuant to the Settlement Facility and Fund Distribution Agreement, Art. § 1.06 and the Amended Joint Plan of Reorganization, Art. § 1.53.

unavailing. Paragraph 4 of Section 6.3 of the B.C. Agreement does not provide the Canadian provinces recourse against Dow Corning if the settling Personal Injury Claimant fails to notify the B.C. Claims Administrator of the Canadian provinces' claim. The specific language only states that if a subrogation claim by a Canadian province is not settled, then the *underlying claimant* must indemnify Dow Corning against the Canadian province's subrogation claim. Should the Canadian provinces seek to recover on their unreimbursed subrogation claim, as the Bankruptcy Court noted, they will then have a direct claim against the Debtor which will be channeled to the Litigation Facility, which is the same manner the claims of the United States, or any other governmental entity, is treated under the Amended Joint Plan. *Classification and Treatment Op.*, 244 B.R. at 673. The Amended Joint Plan does not preclude the United States from directly asserting any claim against the Debtor. These claims are channeled to the Litigation Facility which treatment is similar treatment to the treatment of unresolved subrogation claims under the B.C. Agreement.

Although the treatment provided to the United States' claims under the Amended Joint Plan is not identical to the treatment extended to Alberta and Manitoba under the B.C. Agreement, identical treatment is not what § 1123(a)(4) requires. Within-class treatment only requires that there is an approximate measure of equality. *Classification and Treatment Op.*, 244 B.R. at 673; *cf. In re Middle Plantation of Williamsburg, Inc.*, 47 B.R. 884, 892 (E.D. Va. 1984); *In re Central Medical Center, Inc.*, 122 B.R. at 575; *In re Resorts*, 145 B.R. at 447. The Bankruptcy Court did not clearly err in finding that all Class 15 claims received similar treatment.

c. Cram Down/Fair and Equitable Treatment

Section 1129(b)(1) allows for confirmation of a plan against a non-accepting class and allows for discrimination against the non-accepting class only when that discrimination is "unfair." 11 U.S.C. § 1129(b)(1). Unfair discrimination is not defined under the Bankruptcy Code but the prevailing view is that a plan will not unfairly discriminate if there is "a rational or legitimate basis for discrimination and [if] the discrimination [is] ... necessary for the reorganization." *In re Crosscreek Aparts., Ltd.*, 213 B.R. 521, 537 (Bankr. E.D. Tenn 1997). Section 1129(b)(2)(B) applies to the determination of whether a plan is fair and equitable to a rejecting class of unsecured creditors which provides:

> (2) For purposes of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirement:
>
> (B) With respect to a class of unsecured claims–
>
> (i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or
>
> (ii) the holder of any claim or interest that is junior to the claims of such class

> will not receive or retain under the plan on account of such junior claim or interest any property.

11 U.S.C. § 1129(b)(2)(B).

The Bankruptcy Court found that because all Class 15 claims are channeled to the Litigation Facility for resolution, unless different treatment is agreed to, and since Class 15 claimants who obtain judgments against the Litigation Facility will be paid in full by the Settlement Facility, the Plan satisfies the provision in subsection (i) that the plan provide the holder of the claim to receive or retain the value equal to the allowed amount of such claim. *Class 15 Cram Down Opinion*, 244 B.R. at 711-12. However, the United States argues that its claims are being cut-off in the Settlement Facility if a breast-implant claimant chooses to settle a claim with the Settlement Facility. Every time a settling breast-implant claimant against whom the United States has a potential subrogation claim sits down at the negotiating table with the Settlement Facility and reaches a settlement, the United States claims its share should be taken off the top. Because the Amended Joint Plan does not afford the United States this claim in the Settlement Facility, the United States argues that its claim is not being paid in full.

The Bankruptcy Court found this argument to be without merit for a number of reasons. First, the Bankruptcy Court noted that the claimant's choice to settle with the Settlement Facility is a settlement discussion, which is not an action or proceeding as contemplated under the MSP, 42 U.S.C. § 1395y(b)(2)(B)(ii) or the MCRA, 42 U.S.C. § 2651(b). The Bankruptcy Court stated that "[n]othing in either

statute entitles the Untied States to barge its way into private settlement negotiations." *Cass 15 Cram Down Opinion,* 244 B.R. at 712. Second, the Bankruptcy Court found that the United States does not possess claims against the Settlement Facility under the Amended Joint Plan since all its claims are channeled to the Litigation Facility. *Id.*

The Bankruptcy Court did not clearly err in its finding that the Amended Joint Plan does not unfairly discriminate against the United States' claims since its claims will be paid in full, if allowed. As discussed above, the Amended Joint Plan does not interpret the rights of the United States under the MSP but leaves that interpretation to this Court, if necessary. The notice to be sent out to claimants informing them of the loss of confidentiality if they choose to settle will notify the claimants of the United States' potential claim against them and directs the claimant to either contact the United States or the Settlement Administrator regarding the United States' potential claim. The United States, under the Amended Joint Plan, can either contact the Settling Breast Implant Claimant or, if necessary, seek injunctive relief from this Court to enjoin the Claims Administrator's payment to the claimant consistent with applicable law, as interpreted by this Court. If the breast implant claimant refuses to settle, then the United States may fully assert its rights in the Litigation Facility.

d. Good Faith

The United States argues that the Amended Joint Plan was not proposed in good faith under 11 U.S.C. § 1129(a)(3) because it violates "other laws" such as the MSP. Essentially, the United States repeats the same argument it made claiming

the Plan was not "fair and equitable." The Bankruptcy Court found that the Amended Joint Plan was proposed in a legitimate effort to rehabilitate a solvent but financially distressed company because of the thousands of personal injury claims against it. For the same reasons set forth above, the Amended Joint Plan was proposed in good faith because it does not violate the MSP. The procedures set forth in the Amended Joint Plan as to how the United States may assert its rights does not violate the MSP. Although the United States does not have a claim against the Settlement Facility, under the Amended Joint Plan, the United States has the opportunity to contact the breast implant claimant to settle its claim, or, seek injunctive relief before this Court to enjoin the Claims Administrator from paying the Claimant, if this Court were to find that the applicable law allowed such injunctive relief. Should the breast implant claimant refuse to settle, the United States can fully assert its rights against the Litigation Facility. The Court finds that the Amended Joint Plan that the United States has not established that the Amended Joint Plan was not filed in good faith in violation of 11 U.S.C. § 1129(a)(3).

e. Motion to Compel

On May 28, 1999, the Proponents filed a Joint Motion for Summary Judgment Disallowing the United States' claims or, in the alternative, that the claims be limited to the 15,048 reimbursement claims relating to those names identified by the United States. On September 2, 1999, a hearing was held on the Proponents' Joint Motion for Summary Judgment. On September 29, 1999, the United States filed a Second Motion to Compel Discovery from Dow Corning and a hearing was held on the motion on October 21, 1999. On October 29, 1999, the United States filed the instant appeal from the

Bankruptcy Court's October 27, 1999 order entitled "Order on Motion to Compel." The Bankruptcy Court entered its Confirmation Order on November 30, 1999, along with an opinion on the cram down provision relating to the United States' Class 15 claims. On June 22, 2000, the Bankruptcy Court entered its opinion on the Proponents' Joint Motion for Summary Judgment. The United States has filed notices of appeal on the Bankruptcy Court's opinion and order relating to the Proponents' Joint Motion for Summary Judgment. At this time, the appeals have not been briefed by the parties.

28 U.S.C. § 158(a) states in pertinent part:

> (a) The district courts of the United States shall have jurisdiction to hear appeals
>
> (1) from final judgments, orders, and decrees;
>
> * * *
>
> (3) with leave of the court, from other interlocutory orders and decrees;
>
> of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title.

28 U.S.C. § 158(a). In bankruptcy cases, the finality requirement is considered "in a more pragmatic and less technical way than in other situations." *In re Dow Corning (Lindsey I)*, 86 F.3d at 488 (quoting *In re Cottrell*, 876 F.2d 540, 541-42 (6th Cir. 1989)). Where an order in a bankruptcy

case finally disposes of discrete disputes within the larger case, it may be appealed immediately. *In re Dow Corning (Lindsey I)*, 86 F.3d at 488. "A 'final' decision generally 'ends the litigation on its merits and leaves nothing for the court to do but execute the judgment.'" *In re Sun Valley Foods Co.*, 801 F.2d 186, 189 (6th Cir. 1986)(quoting *Catlin*, 324 U.S. at 233). Review of final orders is mandatory but review of interlocutory orders is left to the federal district court's discretion. *In re American Freight System, Inc.*, 153 B.R. 316 (D. Kan. 1993); *In re Bradford*, 192 B.R. 914, 916 (E.D. Tenn. 1996). Federal courts are reluctant to hear interlocutory appeals. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981). In determining whether to review an interlocutory appeal, based on 28 U.S.C. § 1292(b), an appeal may be taken from an interlocutory order only where the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and an immediate appeal may materially advance the ultimate termination of the litigation. *In re Bradford*, 192 B.R. at 916. The appellant bears the burden of establishing exceptional circumstances warranting review of an interlocutory order. *Id.*

Under the collateral order doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), it is not always necessary that a judgment terminate an action before an appeal may be brought. The collateral order doctrine permits appellate review of decisions which "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546; *In re Dow Corning (Lindsey I)*, 86 F.3d at 488. A

collateral order may be reviewed when it: 1) conclusively determines the disputed question; 2) resolves an important question completely separate from the merits of the action; and 3) is effectively unreviewable on appeal from final judgment. *In re Dow Corning (Lindsey I)*, 86 F.3d at 488; *Pacor,* 743 F.2d at 988.

The United States presents three issues on appeal based on the Bankruptcy Court's October 27, 1999 Order: 1) that the Bankruptcy Court erred by limiting the United States to the 15,048 persons identified as of October 27, 1999; 2) that the Bankruptcy Court erred in denying the United States full access to identifying information about breast implant recipients; and 3) that the Bankruptcy Court erred in denying the United States access to market share information. The United States argues that the October 27, 1999 order constitutes a final order since its claims are effectively limited to the 15,048 claimants it has identified. Although the United States argues that the October 27, 1999 order is not an order granting partial summary judgment in favor of the Proponents, it argues that the Bankruptcy Court's "Order on Motion to Compel" is final on the issue limiting the United States to 15,048 claimants which issue was brought before the Bankruptcy Court by way of the Proponents' Joint Motion for Summary Judgment.

The Proponents argue that the appeal regarding the claims allowed or disallowed by the Bankruptcy Court is interlocutory and is premature since the Bankruptcy Court, as of the filing of the United States' appeal, had not ruled on the balance of the Proponents' Joint Motion for Summary Judgment. The Proponents assert that the Bankruptcy Court's October 27, 1999 Order regarding the disallowance of the

United States' claims and limiting the claims to 15,048 claimants was essentially an order granting partial summary judgment in the Proponents' favor. The Proponents further argue that the Bankruptcy Court's discovery rulings on access to proofs of claim and market share are also interlocutory.

This Court's review of the October 27, 1999 "Order on Motion to Compel" indicates that the order is an interlocutory order as to the discovery issues. The Court will not review that portion of the order because the United States has not set forth sufficient reasons that controlling question of law as to which there is substantial ground for a difference of opinion is involved in the Bankruptcy Court's order. The United States has not shown that an immediate appeal may materially advance the ultimate termination of the litigation given that at the time the appeal was filed, the Bankruptcy Court had not ruled on the summary judgment motion filed by the Proponents.

With regards to the disallowance of the United States' claim limiting its claim to the 15,048 identified individuals, the Court finds that essentially, the Bankruptcy Court did in fact partially grant the Proponents' Joint Motion for Summary Judgment on this issue. When the October 27, 1999 order was issued by the Bankruptcy Court, briefs had been filed and a hearing held on the Proponents' Joint Motion for Summary Judgment. There is no dispute that the Proponents not only sought to disallow the United States' claims in their Joint Motion for Summary Judgment but alternatively sought to limit the United States' claims to the 15,048 individuals identified by the United States. Because the October 27, 1999 order partially granted the United States' Joint Motion for Summary Judgment, the Bankruptcy Court's order is an

interlocutory order since it does not fully dispose of the issues before the Bankruptcy Court. As the United States notes in its Reply Brief, the Bankruptcy Court's order did not contain a Fed.R.Civ.P. 54(b) notation that an entry of judgment as to fewer than all claims can be entered "only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." (United States' Reply Brief, p. 7) Based on this statement, the United States concedes that there has been no judgment entered as to the Bankruptcy Court's October 27, 1999 Order regarding the disallowance of the United States' claims and limiting the claims to 15,048 individuals identified by the United States, therefore, the October 27, 1999 Order is an interlocutory order. An order granting partial summary judgment is interlocutory. *Leonard v. Socony-Vacuum Oil Co.*, 130 F.3d 535 (7th Cir. 1942).

The Court also declines to review the October 27, 1999 Order under the collateral order review doctrine. Although the order may have conclusively determined the disputed question at issue, it does not resolve an important question completely separate from the merits of the rest of the summary judgment motion nor is the matter unreviewable on appeal from final judgment.

Even if this Court were to grant an interlocutory appeal on this issue, because the October 27, 1999 Order is lacking in findings of fact either based on the requirements of Fed.R.Civ.P. 56 or based on the language of the order, it would be impossible for this Court to review the merits of the United States' arguments at this time. *See Terry Barr Sales Agency, Inc. v. All-Lock Co.*, 96 F.3d 174, 178 (6th Cir. 1996). The matter would have to be remanded to the

Bankruptcy Court for further findings of fact on the disallowance issue. Because the Bankruptcy Court has since issued its order and opinion on the Proponents' Joint Motion for Summary Judgment on the United States' proofs of claim, and the United States has filed appeals from the order and opinion, the matter will be reviewed by this Court since there is no dispute that the Bankruptcy Court's June 22, 2000 opinion and order is a final order. The Court declines to review the United States' appeal of the Bankruptcy Court's October 27, 1999 Order at this time.

f. This Court's Order re Notice

The Government claims that this Court had no jurisdiction to enter the order on December 24, 1999 which modified the Bankruptcy Court's November 30, 1999 Order regarding when the confidentiality notice should be sent to the claimants. The Government argues that because the Proponents failed to appeal the underlying Confirmation Order, this Court has no authority to modify the Confirmation Order. In its reply brief, the Proponents claim this Court has broad power and since they are seeking only a limited procedural relief, this Court has jurisdiction over that limited request. The Proponents cite to Fed.R.Civ.P. 62 and Bankruptcy Rules 7062 and 8005.

Rule 62 provides the district court authority to stay proceedings pending appeal. Bankruptcy Rule 7062 allows for stay of proceedings from an automatic stay. Bankruptcy Rule 8005 allows for stay pending appeal.

There is no dispute that the November 30, 1999 Confirmation Order is a final and appealable order. *In re*

Wade, 991 F.2d 402, 406 (7th Cir. 1993). A party may appeal a final order to the district court under 28 U.S.C. § 158(a)(1). The Bankruptcy Rules provide that a notice of appeal must be filed with the clerk within 10 days of the date of the entry of the judgment or order appealed from. Bankr.R. 8001 and 8002. The Advisory Committee's Note to Rule 8001 states that "a notice of appeal be filed whenever a litigant seeks to secure appellate review by the district court or bankruptcy appellate panel." The filing of a timely notice of appeal is jurisdictional and filing a timely notice of cross-appeal is also jurisdictional where an appellee wishes to attack part of a final judgment. *S.E.C. v. Youmans*, 729 F.2d 413 (6th Cir.), *cert. denied sub nom, Holliday v. S.E.C.*, 469 U.S. 1034 (1984). There is also no dispute that the Proponents did not appeal the Confirmation Order with regards to the notice provision.

It is true that the Proponents appear to seek limited relief of the Confirmation Order. However, the Government's argument that this Court has no jurisdiction over the request since the Proponents failed to timely file an appeal of the Confirmation Order has merit. It could be likened to a final judgment entered by this Court under a non-bankruptcy civil action where a party thereafter files a motion before the Court of Appeals to change one provision in the order without that party filing an appeal before the Court of Appeals. The Proponents have not cited sufficient authority to support their position, especially since they did not file an appeal of the Confirmation Order on thenotice provision issue.

If the Court were to consider the motion as a Motion for Stay Pending Appeal, generally, it is the appellant who files such a motion in conjunction with the notice of appeal.

There is no dispute that the Proponents did not follow the procedures set forth in Bankruptcy Rule 8005 which states that it must first be presented to the bankruptcy judge.

A party seeking a stay must meet the following four factors which apply to an appeal of a bankruptcy court's order to the district court: 1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; 2) the likelihood that the moving party will be irreparably harmed absent the stay; 3) the prospect that others will be harmed if the court grants the stay; and 4) the public interest in granting the stay. *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991); *In re First South Savings Ass'n*, 830 F.2d 700, 709 (5th Cir. 1987).

The Government claims that the Proponents were unable to meet the factors. The Proponents admit that they are not challenging the propriety of the notices, thus, the Proponents cannot demonstrate that it would likely succeed on the merits. Although this Court thought so at the time, the Proponents have not shown that they would suffer irreparable harm if the date was not moved from December 24, 1999, other than "confusion" by the claimants. The Proponents have not cited any authority on this issue. In any event, if they were going to suffer irreparable harm, then the issue should have been brought timely before the Bankruptcy Court rather than waiting 20 days after the Confirmation Order was issued. The Government argues that the claimants themselves are the ones harmed by the stay because the Confirmation Order provides that the claimants have until March 1, 2000 to decide whether to maintain her claim. Delaying the notice only shortens the time the claimants have to make the election. The stay may have served the public interest based on the holiday

season, however, the Government points out that they too have rights, one of which is to determine which claimants have requested benefits under the Medicare Trust Fund. The issue of whether the Claims Administrator is available is irrelevant according to the Government because it does not affect the issue of whether a claimant should disclose her identity to the Government.

Although not addressed by the parties, the motion could have been construed as a writ of mandamus. However, the Supreme Court has shown general reluctance to grant writs of mandamus.*Mallard v. United States District Court*, 490 U.S. 296, 109 S.Ct. 1813, 1822, 104 L.Ed.2d 318 (1989). Writs of mandamus may be granted when two conditions exist. First, "petitioners must show that they lack adequate alternative means to obtain the relief they seek. ..." *Id.* 109 S.Ct at 1822. Second, petitioners must show that their right to the issuance of the writ is "clear and indisputable." *Id.*

The Proponents have not shown that they lacked alternative means to obtain relief. They did not first seek the concurrence of the Government. They did not seek relief at an earlier time when the Bankruptcy Court was available. The Proponents have not shown that they have a "clear and indisputable" right to amend the Confirmation Order to change the notice from the December 24, 1999 date.

Because there is no basis for the Court's jurisdiction over the entry of the December 24, 1999 order which modified the November 30, 1999 Confirmation Order's notice provision, the Court sets aside the December 24, 1999 Order.

IX. CASE MANAGEMENT ORDER

Article Seven of the Amended Joint Plan of Reorganization provides certain conditions precedent before confirmation, including the District Court having entered the Case Management Order ("CMO"). Amended Joint Plan, § 7.1.2. The CMO is defined as "the order to be entered by the District Court pursuant to which the Claims of Non-Settling Personal Injury Claimants shall be resolved, which order shall be in substantially the form negotiated and agreed to by the Debtor, the Shareholders and the Tort Committee and attached as an exhibit to the Litigation Facility Agreement." Amended Joint Plan, § 1.25. On February 4, 1999, the Proponents filed with the Bankruptcy Court and distributed to interested claimants a proposed CMO. In its January 24, 2000 Scheduling Order regarding the various appeals of the Confirmation Order, this Court requested comments on the proposed CMO. The Proponents thereafter submitted a revised CMO with minor changes to conform the terminology of the CMO to the Plan, particularly as to certain defined terms, and to clarify that the timetable for processing cases pursuant to the CMO is tied to the Effective Date of the Plan.[15] The proposed revised CMO does not differ in any

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[15] The Effective Date of the Amended Joint Plan is "the first Business Day (a) that is at least 11 days after the Confirmation Date; (b) on which no stay of the Confirmation Order is in effect; and (c) on which all conditions to effectiveness of this Plan have occurred or been waived." Amended Joint Plan, § 1.59. One of the conditions to the effective date of the plan includes "[n]o timely-filed appeal shall have been taken from the Confirmation Order challenging, directly or indirectly, the validity and enforceability of the releases and injunctions described in sections 8.3 and 8.4 of the

material respect from the original draft CMO made available to the Bankruptcy Court and other interested parties. The following parties filed comments on the proposed CMO: The Nevada Claimants, the United States, the Official Committee of Physician Claimants, Helene D. Schroeder, Marti Jacobs, and the Altig Claimants.

The Proponents claim that the proposed CMO is a product of extensive and hard-fought negotiations between the Plan Proponents conducted with the substantial assistance of the Special Master. The CMO reflects a delicate balance of compromises between the needs and aspirations of the Tort Claimants' Committee and the Debtor. The Proponents claim that the CMO is a principal tool for the implementation of the Amended Joint Plan in the resolution of the claims of the Non-Settling Personal Injury Claimants. For these reasons, the proposed CMO submitted by the Proponents cannot be casually recast to accommodate the specific desires of one or more objectors. Absent a clear demonstration of a legal defect involving a material adverse impact on due process rights, the Proponents argue that the CMO should be entered in its current form.

Plan and/or limits the required funding as set forth in the Funding Payment Agreement for the release, satisfaction and discharge of all claims in Classes 5 through 19 of the Plan (collectively, "*Release/Funding Issues*"), or, if such an appeal regarding any Release/Funding issue shall have been filed, such appeal shall have been denied or dismissed and such releases and injunctions and such limits of required funding shall have been affirmed in all respects pursuant to a final Order." Amended Joint Plan, § 7.2.1.

This Court has reviewed the parties' comments to the proposed CMO and finds that many of the objections to the CMO are based on those parties' arguments on the substance of their appeals, which have now been addressed by the Court. The Nevada Claimants made specific proposed changes to the proposed CMO to conform to their arguments on appeal.

The Nevada Claimants, Schroeder, and the Altig Claimants argue that some of the cases should be tried in state courts or other venues. However, in the bankruptcy context, this Court is bound by 28 U.S.C. § 157(b)(5) which states that personal injury tort claims "shall be tried in the district court in which the bankruptcy case is pending, or in the district court in which the claim arose, as determined by the district court in which the bankruptcy case is pending." 28 U.S.C. § 157(b)(5). Although the CMO provides in certain circumstances that a case may be tried in the state courts upon recommendation by the Special Master and approval by all parties to the case and the Litigation Facility, the Court will review any such recommendation in light of 28 U.S.C. § 157(b)(5) and will not enter any order in violation of said statute. Amended Joint Plan, §§ 1, 12.

The United States raises its discrimination argument also addressed in its appeal brief. Although the Proponents assert that the United States does not have standing under the CMO, the Court finds that the United States does have standing under the CMO given that its claims in Class 15 are channeled to the Litigation Facility. The United States also argues against the privileged documents provision in the CMO which governs how privileged documents are handled during the litigation process. However, this Court will resolve

any disputes regarding documents to be admitted at trial. The CMO does not prohibit a party from filing motions before the Court after the initial entry of the CMO.

The Physicians Claimants' Committee and Marti Jacobs argue that the entry of the CMO is premature given the appeals before the Court. Because the Court has addressed the merits of the parties' appeals in this matter, the entry of the CMO at this time is appropriate and in keeping with the language of the Amended Joint Plan.

The parties objecting to the CMO have not shown that their due process rights would be violated in the entry of the CMO. The Court will enter the CMO, as proposed by the Proponents, with minor changes, such as the proper address, telephone numbers, and case numbers. It is noted that the CMO is only the initial case management order in this matter. As noted above, the CMO does not prohibit a party choosing litigation in this matter from filing a motion before this Court to seek relief from the Court in that party's case.

X. CONCLUSION

The Court is very much aware that numerous interested parties have waited over five years for the resolution of this matter since the Debtor filed its petition for bankruptcy in May 1995 and that many more who filed actions against the Debtor before it filed for bankruptcy have waited a much longer period of time. Depending on how the parties in this matter proceed after reviewing this Court's decision, the wait may be longer. However, the Court notes that in this country's judicial system, with its rules and procedures enacted by Congress, all parties, including the

thousands of personal injury claimants, the many other creditors, the Government, the Debtor and other interested parties, are allowed the opportunity to pursue any claims and arguments they believe they may have to the fullest extent possible under the law and the judicial system. The United States Constitution and the rules and laws governing the judicial system, although they may not be perfect, were enacted to ensure that all parties' due process rights are observed by the courts. This Court is aware that this case is one of the largest mass tort bankruptcy actions ever filed in this country's judicial system and that many lives are affected by the outcome of the case. This Court has attempted to ensure that all the litigants and parties before it have had the opportunity to fully present their concerns within the procedural rules and laws governing the action and the judicial system. The Court will attempt to do so in the future. The Court is mindful that many parties with the assistance of the Courts' Special Master have attempted to negotiate a consensual agreement in this case–some have been successful and some have not. However, the Court has observed that the parties before this Court and the Bankruptcy Court have worked diligently on behalf of their clients' interest and, if proceeding *pro se*, on their own behalf, to ensure that their rights are protected. This Court commends all the parties involved in this matter for their patience and hard work.

For the reasons set forth above, the Court AFFIRMS the Bankruptcy Court's November 30, 1999 Order Confirming the Amended Joint Plan and REVERSES the Bankruptcy Court's December 21, 1999 Opinion on the release and injunction provisions issue. The Case Management Order is entered in Master Docket Case No. 00-CV-00001-DT.

/s/ _____
DENISE PAGE HOOD
United States District Judge

DATED: February 5, 2001

APPENDIX G

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

Case No. 95-20512
Chapter 11

[Filed December 21, 1999]

In re: DOW CORNING CORPORATION,	)
	)
	)
Debtor.	)
	)

OPINION ON BEST-INTERESTS-OF-CREDITORS TEST, FEASIBILITY, AND WHETHER PLAN AND THE PROPONENTS COMPLY WITH THE APPLICABLE PROVISION OF TITLE 11

The Debtor and the Official Committee of Tort Claimants ("TCC") filed a Joint Plan of Reorganization on November 9, 1998. An order confirming the Plan in its amended and modified form was entered on November 30, 1999. In conjunction with that order, the Court on the same date released its Findings of Fact and Conclusions of Law. This is the last in a series of opinions serving to supplement and explain these findings and conclusions.

A general overview of the Plan's terms is contained in the opinion on classification and treatment issues. When necessary, additional Plan terms are explained here. Except when otherwise stated, all statutory references are to title 11 of the United States Code (the Bankruptcy Code).

I. Section 1129(a)(7)

The two strongest § 1129(a)(7) objections were raised by several parties, but were argued most vociferously by certain Nevada Claimants represented by the law firm of White and Meany. The first of these objections stems from the $400 million net present value cap on the Litigation Facility's liability. The second pertains to the Plan provision disallowing punitive damages. These objectors argued that, as a result of these provisions, the Plan does not insure that claims of breast-implant claimants who choose to litigate would be paid an amount not less than what they would receive via a chapter 7. Both of these arguments raise the best-interests-of-creditors test, 11 U.S.C. § 1129(a)(7), as a bar to confirmation. These are legitimate and difficult issues from an academic standpoint. Unfortunately for the objectors, the evidence at the confirmation hearing does not support a finding in their favor.

The Plan proceeds on the assumption that $2.35 billion (net present value) will be sufficient to pay all personal injury claims in full, either through settlement or litigation. The Proponents assert that the Court can make a finding of fact that the funding is adequate to accomplish this task. But the Nevada Claimants insist that a plan must provide absolute certainty that the confirmation standards are met, most especially the best-interests-of-creditors standard. They argue

that so long as there is any doubt on the subject, the Plan cannot provide for classes subordinate to them. But such is not the standard for confirmation of a plan. Findings of fact at a confirmation hearing are by a mere preponderance of the evidence. *In re Trevarrow Lanes, Inc.*, 183 B.R. 475, 479 (Bankr. E.D. Mich. 1995). Certainty is never the test in a bankruptcy reorganization. It is commonplace for a plan to make provisions for creditor classes as well as to reserve equity for equity classes. If the reorganized debtor defaults some time after plan confirmation, and some creditors are left unpaid, usually their sole recourse is to enforce their allowed claim in a nonbankruptcy forum. In other words, equity does not revert to creditors.[1] *In re Xofox Indus., Ltd.*, No. 98-21696, 1999 WL 1084231, at *2-3 (Bankr. E.D. Mich. Nov. 29, 1999); *In re Jordan Mfg. Co.*, 138 B.R. 30, 37 ("When a Chapter 11 plan is confirmed and the debtor fails to pay, the creditors' remedy is not to seek a revocation of the discharge, but rather to enforce the debtor's obligation to the creditor arising out of the Chapter 11 proceeding.") (quoting *In re Curry*, 99 B.R. 409, 410 (Bankr. C.D. Ill. 1989); Randy P. Orkik, *Conversion After Chapter 11 Plan Confirmation What Is It Good For? - Absolutely Nothing!*, 23 Cal. Bankr. J. 91, 95 (1996) ("Breach of a plan, in and of itself, is not grounds for revocation of the order of confirmation. The parties seeking revocation must show fraud in procuring confirmation of the plan.").

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[1] That is, unless the plan itself provides for such a remedy. *See, e.g., In re Winom Tool & Die, Inc.*, 173 B.R. 613, 621 n.2 (Bankr. E.D. Mich. 1994).

Until an effective time machine becomes available, a certain percentage of trials will continue to reach a factually incorrect result. In most courts trials require the judge or jury to determine an historical fact. Did this defendant murder the decedent? Did this defendant run the red light and thereby cause injury to the plaintiff? Bankruptcy judges are sometimes called upon for fact-finding of a similar nature. Did this debtor deface the plaintiff's automobile so that the resulting damages are nondischargeable? But by far the more common form of "fact-finding" is of a future event. Bankruptcy judges make all sorts of prognostications in the form of "findings of fact." For example: Is the secured creditor's claim adequately protected by a replacement lien on new inventory? Does the chapter 13 plan provide "that all of the debtor's projected disposable income to be received in the three-year period . . . will be applied to . . . the plan?" 11 U.S.C. § 1325(b)(1)(B). Is it likely that confirmation of the plan will "be followed by the liquidation, or the need for further financial reorganization, of the debtor?" 11 U.S.C. § 1129(a)(11). Juries err from time to time. It has always been so. It will likely forever be so. People have lost their lives because a jury mistakenly thought – beyond a reasonable doubt no less – that they were guilty of capital offenses. People and companies have been bankrupted due to a jury's erroneous finding – by a mere preponderance of the evidence – that the defendant caused the plaintiff harm. Yet even with this knowledge, the criminal and civil justice systems plod on. To paraphrase Sir Winston Churchill: It has been said that our legal system is the worst . . . except for all the others that have been tried.

The Nevada Claimants protest that, because this Court might err in its prognostication that the Litigation Facility is

sufficiently funded to pay all claims which survive trial, the Plan cannot be confirmed. But, as noted, the possibility of error is inherent in any ruling. A court cannot let that possibility paralyze it from making the tough decisions. A court relies on the evidence and whatever learning and common sense it can bring to the case to make the best judgment available.

In this case, on the issue of the sufficiency of the net present value $400 million Litigation Facility funding, the question is not even close. In order to properly justify this statement, however, we must first deal with the issue of punitive damages, for if punitive damages were realistically available, there would be more doubt about the previous finding.[2]

A. Punitive damages

It is true that unsecured creditors are entitled to be paid not just the compensatory damages of their claim, but any exemplary, punitive or multiple damages, before equity is entitled to receive any distribution in chapter 7. 11 U.S.C. § 726(a). In this Plan, the equity security holders will retain their shares in the reorganized debtor, worth billions of dollars, while creditors who might theoretically be entitled to punitive or multiple damages would receive nothing for that species of claim. But a theoretical right of recovery is of no

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[2] This hesitancy is only logical. Nevertheless, the Proponents' principal witness on this issue, Frederick C. Dunbar, testified that his determination that the Litigation Facility's funding would be more than adequate would remain unchanged even if punitive damages were permitted. *See Transcript*, June 29, 1999, at 247-48.

moment unless those creditors are actually entitled to such damages.

This is an issue that was litigated, and though the proofs were skimpy, they were decidedly one-sided. Several witnesses testified generally that, in their opinion, the Plan (and more specifically the Settlement and Litigation Facilities) provide for the full payment of all personal injury claims against the estate. Among the several witnesses so testifying was Arthur B. Newman, a senior managing director of The Blackstone Group. The Plan provides for payment of $2.35 billion net present value for tort claimants. Without serious contradiction on cross-examination or otherwise, Mr. Newman testified that in his opinion, in the aggregate, creditors would receive in a chapter 7 no more than they would receive pursuant to the Plan. *Transcript*, July 14, 1999, p. 99. Moreover, before unsecured claims can be paid, they must be liquidated. Without a settlement framework like the one in the Plan, the cost of liquidating hundreds of thousands of claims would be monumental. *See generally In re Dow Corning Corp.*, 211 B.R. 545 (Bankr. E.D. Mich. 1997). There is no way of knowing what type of process would be utilized in the chapter 7. Certainly a trustee would not simply lie down and let the personal injury claimants name their own damage figure. It is probable, therefore, that a chapter 7 estate would defend on liability grounds as well. In this Court's experience, expenses of administration in the likely event of protracted claims litigation and appeals would be enormous. This would leave a much depleted estate for creditors. And, unless the estate were more-or-less exonerated of liability as a result of some consolidated megatrial, (in which case, of course, no tort claimant would be entitled to punitive damages anyway), it is more likely than not that the

total of all allowed claims in the hypothetical chapter 7 would exceed the remaining funds available for disbursement to them. Since funds would be insufficient to pay all of the compensatory damages, no creditor would receive a penny of exemplary, punitive or multiple damages, even if she were otherwise found entitled to it.

The Proponents also called as an expert witness Frederick C. Dunbar, a senior vice-president at National Economic Research Associates, Inc. He is a statistician with a PhD in economics and a leading expert on matters involving estimation in mass tort cases. In addition to the general tenor of his entire testimony that all claims would be paid in full, Mr. Dunbar testified that he had studied every breast implant verdict in the past 3 ½ years and found that no punitive damages had been awarded to plaintiffs. He further testified that even Dow Corning had not been hit with a punitive damage verdict since 1992. *Transcript*, June 30, 1999, at 48. In one well-publicized breast-implant case during this time period a jury returned a verdict for compensatory and punitive damages, but the punitive damages portion of the verdict was set aside. *Transcript*, July 15, 1999, at 149 (Statement of Geoffrey White). *See Mahlum v. Dow Chemical Co.*, 970 P.2d 98 (Nev. 1998).

In the face of this testimony, the Nevada Claimants and others were silent. As a result, theory was trumped by facts. Based on the evidence, the Court can make only one factual finding and that is that punitive damages would not be paid by a trustee in a chapter 7 case. Therefore, the Plan which provides for no punitive damages does not violate the individual rights of any rejecting tort claimant and so satisfies § 1129(a)(7).

For what it is worth, the Proponents also raise an interesting legal issue with regard to the Plan's express refusal to provide for punitive damages. The argument goes as follows. Punitive damages are for the purposes of punishing wrongdoers and deterring them and others from further wrongdoing. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981) ("Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious and to deter him and others from similar extreme conduct."). Punitive damages may be no greater than what is "reasonably necessary" to achieve these goals. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 563 (1996). According to the Proponents, the goals of deterrence and punishment are adequately met in this case without resort to punitive damages because the amount of compensatory damages being paid is sufficient in itself to accomplish these objectives. *Rosado v. Santiago*, 562 F.2d 114, 121 (1st Cir. 1977) (reversing punitive damages award because "[a]n award of actual damages coupled with reinstatement [of employment] is ample relief . . . and a sufficient deterrent to future wrongdoing"); *In re Kratzer*, 9 B.R. 235, 239 (Bankr. W.D. Mo. 1981) (the "award of compensatory damages . . . is sufficient to punish the defendants"); *Magallanes v. Superior Court*, 167 Cal. App.3d 878, 886, 213 Cal. Rept. 547, 552 (1985) (where "the objectives of punishment and deterrence appear to be sufficiently met by the enormity of the present and prospective awards of compensatory damages" and where "the offending goods have long since been removed from the market place," punitive damages against a product manufacturer were refused); *Quick Air Freight, Inc. v. Teamsters Local Union No. 413*, 575 N.E.2d 1204, 1217 (Ohio Ct. App. 1989) (punitive damages need not be awarded

when compensatory damages are sufficient to punish defendants and to deter them and others from similar conduct); *see also* 22 Am. Jur.2d Damages § 264 (Punitive damages "should not be awarded in a case where the amount of compensatory damages is adequate to punish the defendant.").

There is no question but that the ordeal that the Debtor has gone through over the last decade, and more particularly in the nearly five years this case has been pending in bankruptcy court, coupled with the enormous damages it has agreed to pay while still believing that it is not responsible for any of the alleged harms, is truly a deterrent to future conduct which might entail risks of public harm. No rational company would knowingly engage in activity that would risk its continued existence, especially after having so narrowly escaped oblivion.

On the question of punishment, it is easy for this Court to simply say that the Debtor has been punished enough. However, if in fact the Debtor's products caused the harms alleged (something that this Court has no need nor opportunity to decide), and if the product came to market in a manner which justifies punitive damages, then it is difficult to make such a finding. But these more metaphysical questions need not be decided at this time since the record nevertheless supports the Plan's provision for omission of punitive damages.

B. The Sufficiency of the Funding of the Litigation Facility

The evidence was overwhelming that $400 million net present value would be more than sufficient to pay all personal injury claims resolved through litigation in full even after factoring in the costs of the process. The evidence took multiple forms. The first such evidence came from Tommy Jacks, a plaintiff's personal injury lawyer who represented many clients suing the Debtor over their breast implants, who was a member of the Official Committee of Tort Claimants, and who helped negotiate the Plan. He testified that, in his opinion, the funding of the Litigation Facility was adequate for the purpose intended.

> Q And do you have a view as to whether or not the $400,000,000 net present value will be adequate to satisfy non-settling claims in full?
>
> A I do have.
>
> Q And what's the basis for your view?
>
> A Well, . . . my view is based upon my knowledge and experience as a lawyer who is familiar with this litigation and . . . there are a number of reasons why I believe that the amount provided in the facility is . . . an adequate amount.
>
> . . .
>
> A I think . . . the settlement aspects of

this plan are far more beneficial . . . to claimants and to a broader class of claimants than was the corresponding settlement provision made available through the revised settlement program.

I think on that basis that we will see a greater acceptance of the settlement facility and a lower propensity of claimants to opt out. I think at the same time we can't under estimate [sic – overestimate] the effect that the passage of time itself has had in these cases. And I think that's reflected very much in the vote of the various classes of claimants, the overwhelming acceptance of the plan by the vast majority of claimants.

In women who have claims to assert in this case, whether by settlement or by litigation, . . . most of them [have] been involved in litigation now going back to the early 1990's. Certainly to 1992, some seven years. There is, I believe, a tremendous desire of women to achieve closure of their claims.

And I think that will prompt the settlement of claims. The litigation environment I think is an important factor. . . [W]hatever you think about it, it's a more difficult environment for claimants to litigate their claims now than it has been in the past however much we may disagree with conclusions.

> For example . . . the science panel or more recently . . . the National Institute of Medicine. The fact is that those fairly weighty opinions are there and will be given importance by some Courts. And it's for all those reasons I think the expectation should be of . . . a very small number of opt outs.
>
> And I know that's certainly going to be the case . . . among my own clientele as compared with the days of the global settlement or revised settlement program. And I believe that the $400,000,000 amount of funding that's provided is an adequate amount for those claims that will be opted out and litigated.

Transcript, June 28, 1999, at 161-63; *see also id.* at 229-256.

The most important – and impressive – witness on the adequacy of the Litigation Facility's funding was Mr. Dunbar. His qualifications, both educational and experiential, were exquisitely matched to the task for which he was retained. His testimony was thorough, logical, well-documented, and credible. Notwithstanding attempts at cross-examination and at obfuscation in closing argument, the purity of his reasoning shines through.

As the record established, and as is generally well-known, other large breast-implant manufacturers agreed to a revised settlement program in the context of the MDL 926 proceedings in Birmingham, Alabama (the "RSP"). The Plan was based largely on the RSP, but there were significant

differences. Mr. Dunbar testified that because of demonstrated enhancements in the current plan from the RSP, a greater percentage of the eligible population will elect to settle in the Settlement Facility than elected to settle in the RSP. Concomitantly, a smaller percentage of people entitled to do so will opt to litigate in the Litigation Facility. To arrive at an appropriate settlement/litigation ratio, he also used data from a similar mass-tort bankruptcy case, that of A.H. Robins Co.[3] Mr. Dunbar's conclusions on the number of expected litigants was based purely on his statistical models – a model that was theoretically not much different from the one routinely used by real estate appraisers in bankruptcy cases . The factors Mr. Jacks testified about – the increasing fatigue of breast-implant claimants over the lengthy delays; the recent tide of anti-plaintiff scientific studies and resultant publicity; the expansion of the *Daubert* line of cases – played no part in Mr. Dunbar's calculations. His methodology was beyond reproach and his estimation that 7,513 people would opt into the Litigation Facility is adopted by this Court. Moreover, Mr. Dunbar's scientific approach was corroborated to a large extent by the testimony of Tommy Jacks, and even by a witness called by objecting claimants, John C. Thornton III. *Transcript*, July 16, 1999, at 40-58.

Mr. Dunbar next had to determine what the average award would be for plaintiffs proceeding to litigation in the Litigation Facility. Because he was precluded from obtaining information about the settlement of RSP opt-out claimants by

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[3] Although certain claimants vehemently argued that the A.H. Robins experience was not relevant to this task, Mr. Dunbar persuasively explained why it was.

a gag order imposed by Judge Pointer, *see In re Dow Corning Corp.*, 237 B.R. 364, 371 (Bankr. E.D. Mich. 1999), Mr. Dunbar used what he believed was the closest comparable experience – the Dalkon Shield Claimants Trust experience arising from the bankruptcy proceeding of A.H. Robins Co. The information Mr. Dunbar obtained on the Dalkon Shield Claimants Trust was supplemented and corroborated by the testimony of Professor Georgene M. Vairo, who has been the chairperson of the board of trustees of this Trust since 1989. Based on that comparison, Mr. Dunbar concluded that the anticipated average cost of resolving each breast-implant claim, factoring in both plaintiff and defendant verdicts as well as settlements of claims of both domestic and foreign claimants in the Litigation Facility, would be approximately $11,700 in nominal terms. Simple multiplication results in a total nominal expense to the Litigation Facility for resolving breast implant claims of approximately $88 million. Mr. Dunbar then determined that the nominal legal and administrative costs of resolving these claims would be approximately $43.6 million, taking the total nominal costs of resolving breast-implant claims in the Litigation Facility to about $131.6 million.

In addition, the Litigation Facility would be tasked with resolving various other claims such as personal injury claims stemming from products other than breast implants, claims of breast-implant claimants whose implants were made by non-Debtor manufacturers with Dow Corning-produced silicone gel, and the claims of certain commercial and governmental health care providers and insurers. In the aggregate, Mr. Dunbar estimated that these other claims would cost the Litigation Facility approximately $26 million, nominally.

All tolled, Mr. Dunbar testified that the cost to the Litigation Facility for disposing of all disputed personal injury claims in nominal terms, including an allowance for administrative and legal expenses, would come to approximately $157.6 million. The Litigation Facility is expected to pay out funds over a 16-year life. Mr. Dunbar used a 7% discount rate, and calculated that the net present value of this figure is about $83 million. Thus, the $400 million net present value funding of the Litigation Facility is almost five times what will be necessary to satisfy all claims funneled to it.

No credible evidence was introduced to show otherwise. But of all places, a vociferous attack on Mr. Dunbar came from counsel for the Official Committee of Physician Claimants, a party that appeared not to have a dog in this fight.[4] After considering the logic behind the attack on Mr. Dunbar's methodology and conclusions, the Court rejects it. The argument is anything but obvious and no witness, expert or otherwise, makes the case posited. In summary, then, this Court entirely credits the testimony of Mr. Dunbar and adopts in full his findings with regard to the adequacy of the Plan's funding, and specifically, the Litigation Facility's funding for personal injury claims.

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[4] Class 12, a class containing the claims of the physician claimants, voted to accept the Plan by an overwhelming 91.4%. Nevertheless, the Physicians' Committee felt somehow constrained to oppose the Plan. Despite having virtually nothing to ask Mr. Dunbar on crossexamination, and calling no witnesses of his own, counsel unloaded a substantial blast during closing arguments and in a post-trial memorandum at Mr. Dunbar's methodology and conclusions.

II. Feasibility

Two years ago, this Court explained why finding that "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor," would be a simple task. See 11 U.S.C. § 1129(a)(11). In our estimation opinion, we noted that the Debtor's then plan did not say:

> "The Reorganized Dow Corning will pay all tort claims in full. The Debtor expects that the $600 million set aside in the Settlement Trust and the $1.4 billion reserved for the Litigation Trust will be sufficient to do that. However, if it proves to be inadequate, the Reorganized Debtor will nevertheless pay however much is required to satisfy all such claims in full." Such a provision would truly be a promise to pay all tort claims in full. And if the Debtor's plan did contain this hypothetical provision, it would be necessary to determine the aggregate value of tort claims because that value could potentially exceed the financial capabilities of the Reorganized Debtor. *Nobody doubts the Debtor's ability to put up war chests totaling $2 billion*. But it could be that the aggregate amount of tort claims far exceeds $2 billion and that the Reorganized Debtor is incapable of paying the additional amounts necessary to satisfy those claims in full. In that case, the Court could not confirm the proposed plan because the Debtor would be unable to satisfy 11 U.S.C. §

1129(a)(11), commonly referred to as the requirement to establish the "feasibility" of a plan.

Instead, the Debtor's plan essentially says: "The Reorganized Dow Corning will set aside $600 million for settlement of personal injury claims and an additional $1.4 billion for litigation of personal injury claims. The Debtor expects that these amounts will be sufficient to pay all such claims in full. However, if it proves to be inadequate, the claimants will nevertheless receive only that amount and have to share these amounts *pro rata*. To the extent these claimants are not paid in full, the remaining debt will be discharged."

From this summary it is clear why estimation is not necessary for plan confirmation purposes. *The Reorganized Debtor's ability to pay tort claims in full would simply not be an issue under §1129(a)(11) for no matter how large the actual aggregate tort liability may turn out to be, the Reorganized Debtor would clearly be able to perform the pertinent terms of the plan. If the Court estimated the aggregate claims at something within the $2 billion treasury, the plan would be feasible. If the Court estimated the claims at an amount far in excess of $2 billion, the plan would still be feasible, because the Reorganized Debtor's obligation is capped by*

> *the plan at $2 billion, and the Debtor has $2 billion.*

In re Dow Corning Corp., 211 B.R. 545, 568-69 (Bankr. E.D. Mich. 1997) (emphasis added).

Though much about the current Plan differs from the earlier one, the cap on the Litigation Funding plus the possibility (however slight), that personal injury claims are not fully satisfied out of those funds, remains. In this case, no one seriously disputes the Debtor's ability to put up a war chest of $2.35 billion net present value for those claims. *See Funding Payment Agreement*, § 2.01. Nor for that matter is there any doubt that the Debtor will be able to fully fund its entire obligation under the Plan to pay $3.8 billion (net present value) over the Plan's term. And Mr. Newman so testified.

Obviously, the Debtor will be able to satisfy its Plan obligations without liquidating or further financial reorganization.

III. Proponents Comply With Applicable Provisions of Title 11

"The court shall confirm a plan only if . . . (2) [t]he proponent of the plan complies with the applicable provisions of this title." Section 1129(a)(2). This section is worded peculiarly. Exactly how does a plan proponent comply (present tense) with the applicable provisions of title 11? One would think that the sentence should have been written in the past tense, for as he stands before the court at the

confirmation hearing, the proponent cannot help but comply with title 11: He isn't doing anything at the moment.

Probably because the sentence makes no sense as written, treatises and cases have had to infuse it with meaning. Section 1129(a)(2) has been interpreted to pertain almost exclusively to solicitation of ballots. *See* 7 *Collier on Bankruptcy* ¶1129.03[2] (15th ed. rev. 1999); *see also In re Apex Oil Co.*, 118 B.R. 683, 703 (Bankr. E.D. Mo. 1990).

The Official Committee of Unsecured Creditors ("U/S CC") and the Bank of New York asserted that the Proponents did not comply with this provision of the Bankruptcy Code because they did not timely deliver ballots to some of the commercial creditors, and in so doing, failed to properly solicit acceptances of the Plan. But the Bank's and U/S CC's memoranda lacked any argument on this point. As a result, the Proponents similarly did not discuss it in their responsive memorandum. Moreover, neither the Bank nor the U/S CC raised this objection at the confirmation hearing. The Court therefore concludes that they have waived their right to challenge confirmation on this ground.

This situation is analogous to one where a party raises an issue at the trial level but then fails to pursue it on appeal, or where it raises the issue on appeal in a cursory manner with no supporting case law or statutory citations. In either case, the issue not addressed would be deemed waived. It is

> the settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not enough merely to

> mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones. . . . Judges are not expected to be mindreaders. Consequently, a litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its peace.

United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990), *cert. denied*, 494 U.S. 1082 (1990) (internal quotations and citations omitted). *See also United States v. Reed*, 167 F.3d 984, 993 (6th Cir. 1999) (relying on *Zannino*, in finding appellant's argument "forfeited" due to its inadequacy); *United States v. Brown*, 151 F.3d 476, 487 (6th Cir. 1998); *Gafford v. General Electric Co.*, 997 F.2d 150, 167 (6th Cir. 1993); *Bob Willow Motors, Inc. v. General Motors Corp.*, 872 F.2d 788, 795 (7th Cir.1989); *Brown*, 151 F.3d at 492 (Gilman, J., concurring in part and dissenting in part) ("[t]he provisions of [Federal] Rule [of Appellate Procedure] 28 are not simply a technical nicety; they have a direct impact on the functioning of the adversary system.").

There is no logical reason why the standard for briefing issues at the trial level, where the same concerns apply, should be any lower than at the appellate level. Applying that standard here, it is clear that the U/S CC and the Bank waived any objection based upon allegedly improper solicitation of acceptances because there was no reference to such an argument in their briefs, nor did they make (or even suggest) a showing that manifest injustice would result from a finding of waiver. "The burden on the dockets of the federal courts is severe enough already, without requiring the courts

to raise, research, and explain an issue not deemed important enough by the parties to justify mention in their briefs." *Sumner v. Mata*, 449 U.S. 539, 554 (1981). *See also In re Campbell*, 58 B.R. 506 (Bankr. E.D. Mich. 1986).

But even assuming this objection had been pursued, the Court would nevertheless overrule it. The issue raised is one of fact. As there is no record evidence to support the bare allegation that ballots were delivered late to certain members of Class 4, there is no basis for a finding of fact adverse to the Proponents on § 1129(a)(2). What minimal evidence there is supports this Court's finding that the notice, solicitation procedures and balloting were beyond reproach.

This objection fails for yet another reason. It was not shown that any deficiency in the solicitation procedures which might have existed in any way prejudiced the outcome of voting or otherwise affected the rights of those parties to whom ballot delivery was allegedly untimely. Class 4 rejected the Plan. Therefore, the harmless error standard of F.R.Civ.P. 61, made available in bankruptcy proceedings by F.R.Bankr.P. 9005, is applicable. By this rule, the Court "must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." F.R.Civ.P. 61.

Bankruptcy courts, either by applying this standard or by looking to the legislative history of § 1129(a), have refused to deny confirmation of chapter 11 plans based on mere technical or trivial violations of confirmation requirements. One court explained that minor violations of § 1129(a)(2), ought not be viewed as "a 'silver bullet' to kill th[e] Plan," . . . [because] "Congress did not intend to fashion a minefield out

of the provisions of the Bankruptcy Code . . . . [I]f Congress had meant that any infraction, no matter how early on in the case, no matter how minor the breach, and regardless of whether the court has remedied the violations, should result in a denial of confirmation, Congress would have given some clearer indication in the legislative history or made the statutory provision far more express." *In re Landing Assocs.*, Ltd., 157 B.R. 791, 810-811 (Bankr. W.D. Tex. 1993). *See also Kane v. Johns-Manville Corp.* (*In re Johns-Manville Corp.*), 843 F.2d 636, 647 (2d Cir.1988) (refusing to decide if the alleged voting irregularities violated the Bankruptcy Code because they constituted, at most, harmless error and explaining that "[t]he harmless error rule has been invoked in the bankruptcy context where procedural irregularities, including alleged errors in voting procedures, would not have had an effect on the outcome of the case"); *Gilman v. Davis* (*In re State Thread Co.*), 126 F.2d 296, 301 (6th Cir.1942) (holding that although "the district judge erred in reversing the referee's action" of permitting the complaining party to vote at the election of the trustee, because such party had not contended that he had suffered any actual injury, he had "been deprived of a mere technical and not a substantial right," and so the error was harmless).

As noted, there is no evidence showing that some ballots were not timely delivered. However, had this been shown, under the circumstances of this case, this would constitute, at most, a harmless error that would not justify

denial of confirmation of the Plan. Accordingly, this objection is overruled.[5]

IV. Plan Complies With Applicable Provisions of Title 11

A. The Deemed Waivers and Releases

A plan cannot be confirmed unless it "complies with the applicable provisions of [the Bankruptcy Code]." 11 U.S.C. § 1129(a)(1). Terms in a plan which are neither required nor expressly authorized by the Code are nevertheless permissible under § 1129(a)(1) if they are "appropriate . . . [and] not inconsistent with the applicable provisions of" the Code. 11 U.S.C. § 1123(b)(6). *See United States v. Energy Resources*, 495 U.S. 545, 549 (1990) ("The Bankruptcy Code does not explicitly authorize the bankruptcy courts to approve reorganization plans designating tax

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[5] Approximately 25 foreign breast implant claimants represented by Sybil Shainwald, P.C., claimed that they did not receive ballots. Although they say that this fact means that the Plan does not comply with the applicable provisions of title 11, that makes no sense. The Plan is the Plan; it doesn't disseminate itself. What this objection really states is an attack on the second confirmation standard, § 1129(a)(2).

This objection, like those of the U/S CC and the Bank, was never pursued at the confirmation hearing. It is, therefore, likely that this objection, like the others, were resolved to the satisfaction of the objectors prior to the completion of the hearing. Even if this is not the case, this objection likewise will not be sustained as there was no evidence presented in support of the underlying factual allegation.

payments as either trust fund or nontrust fund. The Code, however, grants the bankruptcy courts residual authority to approve reorganization plans including 'any . . . appropriate provision not inconsistent with the applicable provisions of [the Code] . . . .'" (quoting 11 U.S.C. § 1123(b)(5), which has since been recodified as § 1123(b)(6)).

Article Eight of the Plan, entitled "Effects of Plan Confirmation," contains provisions which implicate § 1123(b)(6). Pursuant to § 8.3, personal-injury claims against various parties "are deemed . . . waived and released." *Plan* § 8.3. The next section provides that holders of the claims which have been so deemed "shall be permanently enjoined . . . from . . . commencing or continuing . . . any action" seeking to enforce their claims. *Id.* § 8.4.

Clearly, the Code does not mandate that provisions of this sort be included in a plan. And in this context, the Code also does not explicitly authorize the inclusion of such provisions. *Compare* 11 U.S.C. § 524(g) (allowing for substantially the same relief with respect to a nondebtor's liability arising from asbestos exposure). Accordingly, the Plan cannot be confirmed if §§ 8.3 and 8.4 are inconsistent with the Code or otherwise improper.

Discussion

Sections 8.3 and 8.4 provide:

> 8.3 *Release* . . . [I]n consideration of (a) the promises and obligations of the Debtor-Affiliated Parties under the Plan . . . , (b) the undertakings of the Shareholders . . . , (c) the

undertakings of the Settling Insurers pursuant to their respective settlements with the Debtor, and (d) the release of Claims against the Debtor-Affiliated Parties by the Settling Physicians and Settling Health Care Providers, on the Effective Date (i) all Persons who have held, hold, or may hold Products Liability Claims, whether known or unknown, shall be deemed to have forever waived and released all such rights or Claims, whether based upon tort or contract or otherwise, that they heretofore, now or hereafter possess or may possess against the Debtor-Affiliated Parties, the Shareholder-Affiliated Parties, the Settling Insurers, and, to the extent released by the Debtor under the settlement agreements with such Settling Insurers, [parties related to] . . . the Settling Insurers, and (ii) all Persons who hold, may hold or may have held Personal Injury Claims shall be deemed to have forever waived and released all such rights or Claims, whether based upon tort or contract or otherwise, that they heretofore, now or hereafter possess or may possess against the Settling Physicians (except for Malpractice Claims) or the Settling Health Care Providers (except for Malpractice Claims) (. . . . collectively[,] . . . the "*Released Parties*"), in each case based upon or in any manner arising from or related to . . . [the Debtor's materials and products]

. . .

The . . . Released Parties . . . shall be deemed released by the Quebec Class Action Settlement Claimants, the Ontario Class Action Settlement Claimants, the B.C. Class Action Settlement Claimants and the Australia Breast Implant Settlements Claimants, and shall be entitled to receive executed releases pursuant to [such agreements] . . . .

8.4 *Permanent Injunction Against Prosecution of Released Claims* . . . [F]or the consideration described in section 8.3 above, on the Effective Date all Persons who have held, hold, or may hold Released Claims, whether known or unknown, . . . shall be permanently enjoined on and after the Effective Date from (a) commencing or continuing . . . any action . . . with respect to any Released Claim against the [Released Parties] . . . , the Settlement Facility, [and] the Litigation Facility . . . (collectively, the "*Parties*") or the property of the Parties, (b) seeking the enforcement, attachment, collection or recovery . . . of any judgment, award, decree, or order against the Parties or the property of the Parties, with respect to any Released Claim, (c) creating, perfecting, or enforcing any encumbrance of any kind against the Parties or the property of the Parties with respect to any Released Claim, (d) asserting any setoff, right of subrogation, or recoupment of any kind against any obligation due to the Parties with respect to any Released Claim,

> and (e) taking any act . . . that does not conform to or comply with provisions of this Plan, or the Settlement Facility Agreement and the Litigation Facility Agreement.
>
> . . .

Plan §§ 8.3 and 8.4. *See id.* § 1.59 ("'*Effective Date*' means the first Business Day (a) that is at least 11 days after the Confirmation Date; (b) on which no stay of the Confirmation Order is in effect; and (c) on which all conditions to effectiveness of this Plan have occurred or been waived.").

Among the so-called "Released Parties" are the Debtor[6] and its shareholders, The Dow Chemical Company and Corning, Inc. *See id.* §§ 1.47, 1.163, 1.165. Other beneficiaries of §§ 8.3/8.4 include insurance companies that the Debtor released from claims pursuant to settlement agreements, and health-care providers in Classes 12 and 13 who settle their respective claims against the Debtor. *See id.* §§ 1.159, 1.160 and 1.162.

Before considering whether these provisions are permissible, we must ascertain their meaning. To assist us in that task, we will invoke rules of construction applicable to contracts and statutes. *See generally, e.g., In re Texas Gen. Petroleum Corp.*, 52 F.3d 1330, 1335 (5th Cir. 1995) ("We apply the rules of contract interpretation to the interpretation of a plan of reorganization."); *In re Beta Int'l, Inc.*, 210 B.R.

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[6] Most personal-injury claims against the Debtor are to be paid by a "Litigation Facility" or a "Settlement Facility," both established and funded by the Debtor. *See Plan* § 6.11.3.

279, 285 (E.D. Mich. 1996) ("Interpretation of a Chapter 11 plan is basically a matter of contractual interpretation."); *see also Pennsylvania R.R. Co. v. Chesapeake & Ohio R.R. Co.*, 229 F.2d 721, 727 (6th Cir. 1956) ("[T]he same principles of statutory construction derived from [the cited cases] . . . applies [sic] to the interpretation of contracts . . . .").

We begin our analysis of § 8.3 with consideration of the verb "deem," which simply means "to hold as an opinion" or to "regard." *Random House College Dictionary* (rev. ed. 1980). *See generally, e.g., Klamath Water Users Protective Ass'n v. Patterson*, 191 F.3d 1115, 1119 (9th Cir. 1999) ("Contract terms are to be given their ordinary meaning . . . ."). Section 8.3 does not specify just who is to "regard" the claims in question as having been waived or released. But of course, the only "opinion" on the subject which ultimately matters is that of judges called upon to make a ruling as to whether a claim remains enforceable. Thus we infer that what § 8.3 really means is that *the courts* shall deem the claims to be waived and/or released. And particularly since the Plan contemplates a permanent injunction, we also infer that the first court to do the "deeming" is this one. *Cf. In re Dore & Assocs. Contracting, Inc.*, 43 B.R. 717, 720 (Bankr. E. D. Mich. 1984) (where this Court rejected the "argu[ment] that the mere confirmation of the plan effected a *de facto* permanent injunction").

Next we consider the words "release" and "waiver." The latter term is defined as "[t]he voluntary relinquishment or abandonment – express or implied – of a legal right." *Black's Law Dictionary* (7th ed. 1999). Similarly, a "release" is "the act of giving up a right or claim to the person against whom it could have been enforced." *Id.* In effect, then, the

Plan would have the Court make a finding that the holders of claims affected by § 8.3 have opted not to pursue those claims.

This brings us to the question of just which claim holders are in fact "affected." According to the literal terms of § 8.3, the waiver/release covers "all [such p]ersons," without distinction. However, an alternative construction is suggested by § 8.1, which provides that "any Claim [against the Debtor is discharged] . . ., *whether or not . . . the holder of such Claim has accepted this Plan.*" *Plan* § 8.1 (emphasis added). Section 8.3, which begins on the same page as § 8.1 and is part of the same Article Eight, contains no such language. Thus the implication is that Plan acceptance – while irrelevant to the scope of the discharge – *does* have a bearing on whether a person is to be deemed by the Court to have waived or released her claim. *Cf. Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (citation omitted)). And as will be seen, a narrow construction of § 8.3 makes sense for other reasons.

"[I]n the interpretation of a promise or agreement[,] . . . an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect[.]" *Restatement, Second, Contracts* § 203(a). *See also, e.g., Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 333 (1938) ("[T]o construe statutes so as to avoid results glaringly absurd[ ] has long been a judicial

function."); *Williamson v. Kay* (*In re Villa West Assocs.*), 146 F.3d 798, 803 (10th Cir. 1998) (Under Kansas law, "'[r]easonable rather than unreasonable interpretations of contracts are favored,' and '[r]esults which vitiate the purpose or reduce the terms of a contract to an absurdity should be avoided.'" (citations omitted)); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1468 (D.C. Cir. 1997) ("[A]mbiguity should be resolved in favor of a legal construction of the parties' agreement . . . ."); *Catalina Enters. Incorporated Pension Trust v. Hartford Fire Ins. Co.*, 67 F.3d 63, 66 (4th Cir. 1995) (""It is axiomatic under Maryland law that a court should avoid reading a contract in a way that produces an absurd result, especially when a reasonable interpretation is available."); *id.* (citing a case for the proposition that "when [a contract] provision is susceptible to more than one meaning, a fair and reasonable construction . . . should always be favored over one that leads to [a] harsh and unreasonable result"); *Sporting Club Acquisitions, Ltd. v. Federal Deposit Ins. Corp.*, No. 94-1567, 1995 WL 694128, at * 3 (10th Cir. Nov. 24, 1995) (unpublished) ("[U]nder a long-standing principle of construction, FDIC's interpretation of the contract, [if] . . . unlawful, should be rejected in favor of the legal alternative proposed by SCA." (citing Colorado case law)); *United States v. Fidelity & Deposit Co.*, 10 F.3d 1150, 1154 (5th Cir. 1994) ("Any other construction [of the bond] would be nonsensical under federal law, as such constructions would require us either to rewrite the bond or to make the bond conflict with federal law."); *id.* at 1154 n. 14 (citing cases for the proposition that "contractual language is interpreted whenever possible to uphold the validity of the contract," and "that reasonable doubt about the construction of a contract should be resolved in favor of legality"). For the reasons explained below, the scope of §§ 8.3 and 8.4 must be

limited to accepting creditors if these provisions are to be given "reasonable, lawful, and effective meaning." *Restatement, Second, Contracts* § 203(a).

1. Consistency with the Code

As noted, § 1123(b)(6) requires a finding that the provision in question is "not inconsistent with" the Code. With that requirement in mind, we consider § 524(g).

A product of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 524(g) outlines the circumstances under which "a court that enters an order confirming a plan of reorganization under chapter 11 may issue . . . an injunction . . . to supplement the injunctive effect of [the debtor's] . . . discharge." 11 U.S.C. § 524(g)(1)(A). This injunction "may bar any action directed against" non-debtor parties to recover certain claims that, under the terms of the plan, are to be paid by a trust. 11 U.S.C. § 524(g)(4)(A)(ii); *see* 11 U.S.C. § 524(g)(1)(B). Thus it is clear that the relief which would be afforded the Released Parties by §§ 8.3 and 8.4 of the Plan is substantially the same as the relief available under § 524(g). *Cf. American Hardwoods, Inc. v. Deutsche Credit Corp.*, (*In re American Hardwoods, Inc.*), 885 F.2d 621, 626 (9th Cir. 1989) (rejecting the debtor's "semantic distinction" between "a permanent injunction against the enforcement of a judgment . . . [and a bankruptcy] discharge").

This fundamental sameness is significant because § 524(g) spells out very detailed requirements which must be met before a "supplemental injunction" can issue. *See* 11 U.S.C. § 524(g)(2)(B). Those requirements obviously are not

satisfied here. Yet there clearly is no conflict with § 524(g) if the reach of §§ 8.3 and 8.4 is limited to accepting creditors because § 524(g) describes the conditions which must be met before an *unwilling* creditor can be enjoined from pursuing non-debtor parties. It does not by its terms preclude a creditor from agreeing to forgo its right of recovery against such parties. And since those creditors who accepted the Plan have in substance done just that, *see infra* p. 29-30, §§ 8.3/8.4 do not contravene § 524(g) if narrowly construed. *Cf. In re Arrowmill Dev. Corp.*, 211 B.R. 497, 506 (Bankr. D. N.J. 1997) ("A voluntary, consensual release is not a discharge in bankruptcy."); Judith R. Starr, *Bankruptcy Court Jurisdiction to Release Insiders from Creditor Claims in Corporate Reorganizations*, 9 Bankr. Dev. J. 485, 487 (1993) ("A discharge is an *involuntary* release of creditor claims against an entity (both asserted and unasserted) enforced by the court." (emphasis added)).

On the other hand, a broad construction of §§ 8.3 and 8.4 would seem to be at odds with § 524(g). After all, confirmation of a plan so construed would mean that the Proponents were able to obtain the (non-consensual) "supplemental injunction" which § 524(g) permits, without satisfying that statute's prerequisites. Ordinarily, courts would reject this as a blatant attempt to circumvent the statute. *Cf., e.g., Moran v. Aetna Life Ins. Co.*, 872 F.2d 296, 301 (9th Cir. 1989) ("Congress has expressly limited the persons who may be sued under [29 U.S.C.] section 1132(c). We cannot make an end run around the statute by creating an additional class of persons liable . . . .").

It seems, however, that we are not dealing with an "ordinary" statute. Along with § 524(g), Congress enacted a

"Rule of Construction" which states that "[n]othing in [§ 524(g)] . . . shall be construed to modify, impair, or supersede any other authority the court has to issue injunctions in connection with an order confirming a plan of reorganization." Pub. L. 103-394 § 111(b) (uncodified). The legislative history sheds light on this rather odd rule:

> Section 111(b) . . . make[s] clear that the special rule being devised for the asbestos claim trust/injunction mechanism is not intended to alter any authority bankruptcy courts may already have to issue injunctions in connection with a plan [of] reorganization. Indeed, [asbestos suppliers] Johns-Manville and UNR firmly believe that the court in their cases had full authority to approve the trust/injunction mechanism. And other debtors in other industries are reportedly beginning to experiment with similar mechanisms. The Committee expresses no opinion as to how much authority a bankruptcy court may generally have under its traditional equitable powers to issue an enforceable injunction of this kind. The Committee has decided to provide explicit authority in the asbestos area because of the singular cumulative magnitude of the claims involved. How the new statutory mechanism works in the asbestos area may help the Committee judge whether the concept should be extended into other areas.

Vol. E., *Collier on Bankruptcy*, at App. Pt. 9-78 (reprinting legislative history pertaining to the 1994 Code amendments).

Thus the rule "was apparently intended to prevent a negative implication from being drawn from the fact that the amendments deal only with asbestos-related cases." *Id.* Vol. 4, at ¶524.07[2]. So while the text of § 524(g) indicates that the statute governs *all* chapter 11 reorganizations, it seems that the congressional "Rule of Construction" obliges us to regard § 524(g) as irrelevant to non-asbestos cases. *See* P. Meltzer, *Getting Out of Jail Free: Can the Bankruptcy Plan Process Be Used to Release Nondebtor Parties?*, 71 Am. Bankr. L.J. 1, 31 (Winter, 1997) ("*Getting Out of Jail*") ("In view of the [Rule of Construction] . . . , it can certainly be argued that the enactment of § . . . 524(g) . . . provides no guidance as to issues not involving asbestos liability . . . ."). On the strength of the rule, then, we conclude that the Plan is not inconsistent with § 524(g) even if §§ 8.3 and 8.4 apply to non-accepting creditors.

Whether broadly or narrowly construed, §§ 8.3 and 8.4 do not run afoul of § 524(e). This statute provides that, with an exception not relevant here, the "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e). Some courts assert that § 524(e) prohibits judicial extension of the discharge to non-debtor parties. *See, e.g., Resorts Int'l, Inc. v. Lowenschuss* (*In re Lowenschuss*), 67 F. 3d 1394, 1401 (9th Cir. 1995); *In re Future Energy Corp.*, 83 B.R. 470, 486 (Bankr. S.D. Ohio 1988).

Support for this assertion is provided by § 524(g), which as indicated earlier allows for entry of what amounts to a discharge of asbestos-related claims against a non-debtor. The Code informs us that such a discharge may enter "[n]otwithstanding the provisions of section 524(e)." 11

U.S.C. § 524(g)(4)(A)(ii). This clause suggests that, except as authorized by § 524(g), a non-debtor discharge is precluded by § 524(e).

We believe, however, that the cases cited read too much into § 524(e). This statute simply provides in effect that a third party's liability is not discharged by virtue of a discharge of the debtor's liability. It does not by its terms preclude a court from discharging the liability of a third party. The better view, then, is that entry of a non-debtor injunction – regardless of whether it is consensual – is not incompatible with § 524(e). See, e.g., *In re Specialty Equip. Cos.*, 3 F.3d 1043, 1045-47 (7th Cir. 1993); *In re Digital Impact*, 223 B.R. 1, 10 (Bankr. N.D. Okla. 1998); *In re West Coast Video Enters.*, 174 B.R. 906, 910-11 (Bankr. E.D. Pa. 1994); *In re Heron, Burchette, Ruckert & Rothwell*, 148 B.R. 660, 687 (Bankr. D. D.C. 1992). Section 524(g)'s "notwithstanding" clause is therefore unnecessary, and probably reflects nothing more than an excess of caution on the part of its drafters. *Cf. Western Union Tel. Co. v. FCC*, 665 F.2d 1126, 1138 (D.C. Cir. 1981) ("Congress may have added the proviso merely [for] . . . clarif[ication]. . . . It is true that such a proviso was not absolutely necessary, but clarifying language is never absolutely necessary.").

For the reasons stated, neither § 524(e) nor § 524(g) precludes a court from granting non-debtor discharges. And there is no other Code provision which speaks to the issue. Accordingly, we conclude that §§ 8.3 and 8.4 are not inconsistent with the Code even if they apply to creditors who

did not accept the Plan.[7] But as explained in Part 2 below, these provisions are inconsistent with other law if they encompass non-accepting creditors.

2. Compliance With Non-Bankruptcy Law

We could not confirm the Plan unless § 8.3 is "appropriate" for purposes of § 1123(b)(6). *See, e.g., State of Maryland v. Antonelli Creditors' Liquidating Trust*, 123 F. 3d 777, 785 (4th Cir. 1997). In essence, then, "propriety" turns on whether these provisions are compatible with non-Code law. *See Energy Resources*, 495 U.S. at 550 ("Even if consistent with the Code, . . . a bankruptcy court order might be inappropriate if it conflicted with another law that should have been taken into consideration in the exercise of the court's discretion.") As will be explained, a Plan provision which would require the Court to "deem" that non-accepting creditors have released their claims is contrary to basic legal principles, and is therefore inappropriate.

The verb "deem" is often used to establish what amounts to a legal fiction. *See generally Black's Law Dictionary* (7th ed. 1999) ("[D]eem' . . . [means t]o treat (something) as if (1) it were really something else, or (2) it has qualities that it doesn't have"). But a non-fact cannot properly be transformed into a fact simply to suit a litigant's wishes. Rather, there has to be some foundation for pretending that that which is not, is (or vice versa):

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[7] Of course, preconfirmation claims against Debtor are discharged in any event. *See* 11 U.S.C. § 1141(d)(1); *Plan* § 8.1. Thus, insofar as the waiver/release pertains to such claims, it is just compatible with the Code; it is rendered superfluous by it.

> [W]hen we engage in a fiction, we redefine reality to comport with existing law as a method of changing the law to meet new realities. . . . This method of adapting the law to changing circumstances and perceptions is saved from absurdity by its underlying rationality. . . . [W]hen used properly the legal fiction is a rule of law embodying an unconcealed falsehood at one level and a deeper truth at another more important level. *The falsehood* is often made necessary because of the preexisting structure of the law, and *is justified* (if it is justified) *by the deeper underlying truth contained within the falsehood.*

John A. Miller, *Liars Should Have Good Memories: Legal Fictions and the Tax Code*, 64 U. Colo. L. Rev. 1, 26 n.109 (1993) (emphasis added). *See also Pettibone Corp. v. Easley*, 935 F.2d 120, 123 (7th Cir. 1991) ("Even legal fictions have their limits.").

Such a "foundation" exists insofar as accepting creditors are concerned. By voting in favor of the Plan, these creditors have manifested an intention to accept the rights granted to them under the terms of the Plan in lieu of whatever rights they may have against the Released Parties. *See Specialty Equip.*, 3 F.3d at 1047 ("[A] consensual release . . . binds only those creditors voting in favor of the plan of reorganization."); *In re Zenith Electronics Corp.*, 241 B.R. 92, 111 (Bankr. D. Del. 1999) (A release of third parties "cannot be accomplished without the affirmative agreement of the creditor affected."); *West Coast Video*, 174 B.R. at 911

("[E]ach creditor bound by the terms of the release must individually affirm same, either with a vote in favor of a plan including such a provision, or otherwise."). But *see, e.g., Star Phoenix Mining Co. v. West One Bank*, 147 F.3d 1145, 1147 (9th Cir. 1998) ("[A] creditor's approval of the plan cannot be deemed an act of assent having significance beyond the confines of the bankruptcy proceedings." (quoting *In re Sandy Ridge Dev. Corp.*, 881 F.2d 1346, 1351 (5th Cir. 1989), which was in turn quoting *Union Carbide Corp. v. Newboles*, 686 F.2d 593, 595 (7th Cir. 1982) (per curiam), *overruled by Specialty Equip.*, 3 F.3d at 1045-47); *Arrowmill Dev.*, 211 B.R. at 507 ("[I]t is not enough [to establish the validity of a creditor's release in favor of a non-debtor party] for [the] . . . creditor . . . to simply vote 'yes' as to a plan."). So even though there has been no formal release or explicit waiver, there is a reasonable basis for "deeming" otherwise.

With respect to non-accepting creditors, however, that basis is lacking. Certainly a creditor who affirmatively voted to reject the Plan cannot *fairly* be characterized as having "voluntarily" relinquished her rights against the Released Parties. *See generally Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 92 (1934) ("[L]egal fictions have an appropriate place in the administration of the law when they are required by the demands of convenience and *justice*." (emphasis added)); *In re Chalasani*, 92 F.3d 1300, 1303 (2d Cir. 1996) ("A legal fiction assumes as fact, *for purposes of justice*, that which does not exist." (emphasis added)). And even the inaction of those creditors who cast no vote on the Plan is too ambiguous to warrant the inference that substantive rights have been surrendered. *See Arrowmill Dev.*, 211 B.R. at 507 (The "creditor . . . did not vote for the plan and clearly did not manifest any assent to have his claim against [the non-

debtor party] . . . released."); *see generally, e.g., People's Bank & Trust Co. of Madison County v. Aetna Cas. & Surety Co.*, 113 F.3d 629, 638 (6th Cir. 1997) ("Kentucky cases have recognized the rule found in other states that a finding of implied waiver requires a 'clear, unequivocal, and decisive act showing an intention to relinquish the right.'" (citations omitted)); *United States v. Amwest Surety Ins. Co.*, 54 F.3d 601, 602-03 (9th Cir. 1995) ("An implied waiver of rights will be found where there is 'clear, decisive and unequivocal' conduct which indicates a purpose to waive the legal rights involved." (citation omitted)).

Put simply, then, non-bankruptcy law recognizes a basis for "deeming" only that *accepting* creditors have agreed to give up their rights against the Released Parties. The extension of this "legal fiction" to creditors who did not accept the Plan would be unreasonable and, as to creditors who affirmatively rejected the Plan, patently absurd and unjust. It is also unlawful, and therefore of no effect. *See Specialty Equip.*, 3 F.3d at 1047 (quoted supra p. 29); *West Coast Video*, 174 B.R. at 911 ("[T]he releases of non-debtors included in the Plan cannot be enforced against the Movants. Clearly, the Movants did not cast a vote in favor of the Plan or otherwise affirmatively agree to release the Debtor's principals in connection with this case.").

This whole issue of consent would arguably be moot if we had the power to enjoin creditors (against their will) from pursuing claims against the Released Parties. And there is support for the view that courts have such authority under § 105(a), which states: "The court may issue any order . . . that is necessary or appropriate to carry out the provisions of th[e Code] . . . ." 11 U.S.C. § 105(a). *See, e.g., Munford,*

Inc. v. Munford (*In re Munford, Inc.*), 97 F.3d 449, 454-55 (11th Cir. 1996); *Menard-Sanford v. Mabey* (*In re A.H. Robins Co.*), 880 F.2d 694, 701-02 (4th Cir. 1989) ("Robins I"); *In re Johns-Manville Corp.*, 837 F.2d 89, 93-94 (2d Cir. 1988); *In re Optical Technologies, Inc.*, 216 B.R. 989, 994 (Bankr. M.D. Fla. 1997); *In re Master Mortgage Inv. Fund*, 168 B.R. 930, 934 (Bankr. W.D. Mo. 1994); *Heron*, 148 B.R. at 685.

It is clear from the text of § 105(a), however, that a court's authority thereunder must derive from whatever (other) Code provision the § 105(a) order is designed to "carry out." As explained by the Fifth Circuit, § 105(a) "does not authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity." *United States v. Sutton*, 786 F.2d 1305, 1308 (5th Cir. 1986) (footnote omitted). *See also In re Richard Potasky Jeweler, Inc.*, 222 B.R. 816, 825 (S.D. Ohio 1998) ("[Section] 105, standing alone, cannot serve as a source of authority for granting a permanent injunction [barring creditors from pursuing claims against a non-debtor]."); *In re Sybaris Clubs Int'l, Inc.*, 189 B.R. 152, 155 (Bankr. N.D. Ill. 1995) ("Section 105 . . . is merely a vehicle to carry out the otherwise provided powers of the bankruptcy court."); Meltzer, *Getting Out of Jail*, 71 Am. Bankr. L.J. at 18 ("[Section] 105(a) . . . should be construed . . . narrowly, namely as a limited grant of power to bankruptcy judges to take only those actions which are in furtherance of a specific provision already in the Code."). The Supreme Court implicitly recognized the ancillary nature of § 105(a), stating that "whatever equitable powers remain in the bankruptcy courts must and can only be exercised

within the confines of the Bankruptcy Code." *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988).

Thus if there is authority to in effect grant a discharge of debts owed by a non-debtor party, it must be found not in § 105(a) but elsewhere. This search has led courts to various Code provisions. *See, e.g., Johns-Manville*, 837 F.2d at 93-94 (11 U.S.C. §363(f)); *Potasky*, 222 B.R. at 826 n.16 and accompanying text (11 U.S.C. §§ 1123(b)(3)(A) and/or 1141(c)). However, none of these provisions is on point – an obvious fact which is only reinforced by comparison with § 524(g), a statute which *is* on point. *See* Vol. E., *Collier on Bankruptcy*, at App. Pt. 9-78 (reprinting legislative history pertaining to § 524(g)) ("The Committee expresses no opinion as to how much authority a bankruptcy court may generally have *under its traditional equitable powers* to issue an enforceable injunction of this kind. . . . How the new *statutory* mechanism [established by § 524(g)] works in the asbestos area may help the Committee judge whether the concept should be extended into other areas." (emphasis added)); *cf. City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338 (1994) ("[T]his [statutory] provision 'shows that Congress knew how to draft a waste stream exemption . . . when it wanted to.'" (citation omitted)).

A non-statutory theory advanced in support of this kind of injunction is based on "the ancient but very much alive doctrine of marshalling of assets." *Robins I*, 880 F.2d at 701. The Fourth Circuit explained: "A creditor has no right to choose which of two funds will pay his claim. The bankruptcy court has the power to order a creditor who has two funds to satisfy his debt to resort to the fund that will not

defeat other creditors." *Id.* This theory is flawed on two levels.

Assuming for the sake of argument that the non-debtor injunction really is "analogous" to a marshaling injunction, *id.*, then restrictions associated with use of the latter form of injunction would presumably also be applicable to the former. One such restriction is that the party to be enjoined cannot be prejudiced by the injunction. *See In re Atlas Commercial Floors*, Inc., 125 B.R. 185, 188 (Bankr. E.D. Mich. 1991) and cases cited therein. Yet where liability is capped, as in this case, *see Plan* § 6.11.3; *Amended Joint Disclosure Statement* ¶ 1.1(E), the enjoined creditors *are* prejudiced because, as the Nevada Claimants perhaps irrationally fear, there is some, albeit slight, possibility that they will not obtain full recovery from the Reorganized Debtor.

It could be argued in response that this incremental risk of less-than-full recovery is insignificant. *See supra* pp. 8-13. But whatever the level of risk, the *equitable* solution (and marshaling, of course, is grounded in equity) would be to grant only a provisional injunction -- one which terminates if and when the "primary" fund is exhausted. Indeed, that is precisely what a marshaling injunction would do. *See C.T. Dev. Corp. v. Barnes* (*In re Oxford Dev. Ltd.*), 67 F.3d 683, 687 (8th Cir. 1995) (Under the "federal marshaling doctrine," the enjoined party "may be required to exhaust the fund available to him exclusively *before proceeding against the [second] fund.*" (emphasis added; citation omitted)). An injunction which permanently bars creditors from seeking compensation from the "secondary" payment source is neither equitable nor consistent with the objectives of a marshaling injunction.

As indicated, the foregoing criticism is based on the assumption that a marshaling injunction serves as a suitable analogy to the non-debtor injunction at issue in this and similar cases. That assumption, however, does not withstand analysis.

Stated more fully, "[t]he equitable doctrine of marshalling . . . rests upon the principle that a creditor having two funds to satisfy his debt, may not by his application of them to his demand, defeat another creditor, *who may resort to only one of the funds*." *Meyer v. United States*, 375 U.S. 233, 236 (1963) (emphasis added) (citation omitted). That is manifestly *not* the purpose of a non-debtor injunction: Courts issuing such an injunction are not doing so to protect a subset of creditors whose only recourse is against the non-debtor obligor.

In an apparent attempt to supply the element of creditor protection, and thereby shore up its marshaling-doctrine analogy, the Fourth Circuit explained that the non-debtor injunction serves to prevent recalcitrant creditors from "interfer[ing] with the reorganization and thus with all the other creditors." *Robins I*, 880 F.2d at 702. This objective may be commendable, but of course it is not even remotely similar to the policy underlying the marshaling doctrine.

Like *Robins I*, other courts have defended the non-debtor injunction as a means of facilitating the plan negotiation/confirmation process. *See, e.g., Johns-Manville*, 837 F.2d at 93-94; *see generally* Ralph Brubaker, *Bankruptcy Injunctions and Complex Litigation: A Critical Reappraisal of Non-Debtor Releases in Chapter 11 Reorganizations* ("*Bankruptcy Injunctions*"), 1997 U. Ill. L. Rev. 959, 1009

(1997) ("[T]he paramount concern of courts that approve nondebtor releases is a stated policy favoring reorganizations."). But even if one accepts the premise that confirmation really is the "congressionally preferred" outcome in chapter 11, it does not follow that a court has the authority to invent equitable solutions designed to achieve that objective. *Cf.* Meltzer, *Getting Out of Jail*, 11 Am. Bankr. L.J. at 18 ("[T]here is no mandate in the Code telling bankruptcy judges to do whatever is necessary to confirm plans, or giving them freewheeling authority to try and maximize the number of Chapter 11 cases that result in confirmed plans.").

To the contrary, the circumstances under which a federal court can "play the equity card" are precisely (and rather narrowly) defined:

> [E]quity is flexible; but in the federal system, at least, that *flexibility is confined within the broad boundaries of traditional equitable relief.* To accord a type of relief that has never been available before . . . is to invoke a "default rule," [citation to dissenting opinion] . . . , not of flexibility but of omnipotence. When there are indeed new conditions that might call for a wrenching departure from past practice, Congress is in a much better position than we both to perceive them and to design the appropriate remedy.
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> . . .

> [R]esolving . . . [the arguments for and against recognition of the equitable relief at issue] in this forum is incompatible with the democratic and self-deprecating judgment we have long since made: that the equitable powers conferred by the Judiciary Act of 1789 did not include the power to create remedies previously unknown to equity jurisprudence.
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> . . .
>
> "If . . . a Court of Equity in England did possess the unbounded jurisdiction, which has been thus generally ascribed to it, of correcting, controlling, moderating, and even superceding [sic] the law, and of enforcing all the rights, as well as the charities, arising from natural law and justice, and of freeing itself from all regard to former rules and precedents, it would be the most gigantic in its sway, and the most formidable instrument of arbitrary power, that could well be devised. It would literally place the whole rights and property of the community under the arbitrary will of the Judge, acting, if you please, *arbitrio boni judicis*, and it may be, *ex aequo et bono*, according to his own notions and conscience; but still acting with a despotic and sovereign authority."

Grupo Mexicano de Desarrollo v. Alliance Bond Fund, Inc., 527 U.S. 308, 144 L.Ed. 2d 319, 333, 339 (1999) (emphasis

added; quoting J. Story, 1 Commentaries on Equity Jurisprudence § 19, at 21).

Grupo Mexicano distinguished one of the Court's prior decisions on the grounds that the plaintiff was seeking equitable (rather than legal) relief, and another of its decisions because a public (rather than strictly private) interest was implicated. *See id.* at 335. On the basis of these distinctions, it could be argued that bankruptcy courts can be more "creative" in fashioning equitable remedies than could a federal court presiding over a legal, private dispute. *See generally Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982) (plurality opinion) ("[T]he restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, . . . may well be a 'public right' . . . ."); *see also, e.g., In re Jarvis*, 53 F.3d 416, 419 (1st Cir. 1995) ("Bankruptcy courts . . . are courts of equity, traditionally governed by equitable principles.").

That proposition, however, cannot easily be reconciled with pronouncements of the Supreme Court and Sixth Circuit on the subject of a bankruptcy judge's equitable discretion. *See Ahlers*, 485 U.S. at 206 (*quoted supra* p. 32); *In re Granger Garage, Inc.*, 921 F.2d 74, 77 (6th Cir. 1990) (paraphrasing *Ahlers* and adding that "[a] bankruptcy court does not have unfettered equity powers"). Therefore, unless and until either of these courts rules otherwise, we assume that the mode of analysis in *Grupo Mexicano* applies with equal force in the bankruptcy realm.

In our view, the ground rules laid down by *Grupo Mexicano* preclude the granting of a non-debtor injunction. Absent creditor consent, such an injunction is tantamount to

forcing that creditor to accept terms that she considers to be unacceptable. *See* Brubaker, *Bankruptcy Injunctions*, 1997 U. Ill. L. Rev. at 966 (describing this injunction as a "nonconsensual settlement"). It is an "extraordinary" remedy, one which is "unheard of in any other context." *Id.* By no means, then, can such an injunction be described as a form of "traditional equitable relief." *Grupo Mexicano*, 144 L.Ed.2d at 333. Resort to this "remedy" therefore constitutes the exercise of a power which federal courts simply do not possess. *See id.* at 339-40; *see also* Brubaker, *Bankruptcy Injunctions*, 1997 U. Ill. L. Rev. at 1010 (The proposition that "a bankruptcy judge can unilaterally override legitimate policies embodied in nonbankruptcy law that would place liability upon the released non-debtors . . . is hard to square with the inherent limitations of the judicial process and Congress' primary role in making such policy determinations in the bankruptcy context.").

For these reasons, we conclude that a bankruptcy court has no authority, statutory or otherwise, to issue a non-consensual permanent inunction in favor of non-debtor parties. Thus the absence of legitimate grounds for inferring that a creditor has consented to entry of such an order cannot be dismissed as "harmless error."

3. Sections 8.3 and 8.4 are Permissible Because They Apply Only to Accepting Creditors

As explained above, §§ 8.3 and 8.4 are not inconsistent with § 1123(b)(6) only if construed as applying solely to creditors who voted to accept the Plan. A broader construction of these provisions, besides contravening § 1123(b)(6), would produce results which are at best

unreasonable (if applied to nonvoting creditors) and at worst absurd and unjust (if applied to creditors who actively opposed the Plan). These facts counsel against a broad construction of §§ 8.3 and 8.4.

Of course, we could not reject such a construction if it were plain from the terms of the Plan. Under such circumstances, we would have no choice but to deny confirmation of the Plan. *See* 11 U.S.C. §§ 1123(b)(6), 1129(a)(1); *see also supra* Part 2. It is *not* clear, however, that §§ 8.3 and 8.4 apply without distinction to all persons holding claims of the type described therein. Indeed, it is entirely plausible that the provisions relate solely to those persons who accepted the Plan. *See supra* pp. 21-24. The latter construction is the more sensible, and the one which we adopt. So construed, §§ 8.3 and 8.4 are "appropriate" and "not inconsistent with" the Code. 11 U.S.C. § 1123(b)(6). *See supra* Parts 1 and 2. Therefore, inclusion of these provisions in the Plan does not constitute grounds for denying confirmation.

4. Permanent Injunctive Relief

As indicated earlier, holders of claims against the Released Parties are to be "permanently enjoined" from collecting those claims. *Plan* § 8.4. The basis for this relief is the "deemed" waiver or release of such claims pursuant to § 8.3. *See id.* Thus the reach of § 8.4 is coextensive with § 8.3 – both provisions apply only to those creditors who accepted the Plan.

Since creditors who accepted the Plan have essentially agreed to relinquish their claims against the Released Parties, one could certainly question the need for an injunction. *See generally, e.g., Kallstrom v. City of Columbus*, 136 F.3d 1055, 1068 (6th Cir. 1998) ("[T]o obtain. . . a . . . permanent injunction, plaintiffs must demonstrate that failure to issue the injunction is likely to result in irreparable harm."). But as these creditors also implicitly consented to the granting of injunctive relief, we assume that they have waived whatever arguments might be made in opposition to such relief.

5. Postscript

The Court is mindful of the fact that the release/injunction provisions are perceived by the Debtor and affiliated parties as being of critical importance. In that regard, it is well to bear in mind that, by their own voluntary act, the overwhelming majority of personal-injury claimants are barred from bringing or pursuing claims against the Released Parties.

Nor is there any reason to assume that the Released Parties will be unduly burdened by those claims which are not barred. For one thing, the absolute number of such claims is small in comparison to what the Debtor and the Released Parties faced pre-petition. Moreover, the vast majority of non-barred claims are already pending before Judge Hood in the Eastern District of Michigan. From a practical standpoint, the consolidation of these claims into a single forum greatly simplifies the task of defending against them. And if Judge Hood sees fit, trial could be deferred until Litigation-Facility proceedings have concluded, thereby providing the Released

Parties with the functional equivalent of a temporary (but potentially very lengthy) injunction. Alternatively, actual injunctive relief may be warranted if administration of the Plan is unduly burdened by continued prosecution of the non-barred claims. *Cf. Lindsay v. O'Brien, Tanski, Tanzer and Young Health Care Providers of Connecticut (In re Dow Corning Corp.)*, 86 F.3d 482, 494 (6th Cir. 1996) ("The potential for Dow Corning's being held liable to the non-debtors in claims for contribution and indemnification . . . establish[es] a conceivable impact on the estate in bankruptcy. Claims for indemnification and contribution . . . obviously would affect the size of the estate and the length of time the bankruptcy proceedings will be pending, as well as Dow Corning's ability to resolve its liabilities and proceed with reorganization.").

On the subject of injunctions, it should also be remembered that the highly-prized (or much-dreaded) adjective "permanent" is something of a misnomer. As the Eight Circuit noted, "[i]t is well settled that a district court retains authority under . . . [F.R.Civ.P.] 60(b)(5) to modify or terminate a continuing, permanent injunction if the injunction has become illegal or changed circumstances have caused it to operate unjustly." *Association for Retarded Citizens of North Dakota v. Sinner*, 942 F.2d 1235, 1239 (8th Cir. 1991). *See also In re Hendrix*, 986 F.2d 195, 198 (7th Cir. 1993) ("[A] court can modify an injunction that it has entered whenever the principles of equity require it do so."); *cf. King-Seeley Thermos Co. v. Aladdin Indus., Inc.*, 418 F.2d 31, 35 (2d Cir. 1969) ("[T]here is power to modify an injunction even in the absence of changed conditions . . . ."). So, even if this Court had granted the Proponents an injunction against non-consenting creditors, the Court would

retain the discretion to terminate the injunction so that involuntarily-shortchanged creditors can recover any deficiency from one or more of the Released Parties if the Litigation Facility proved to be inadequately funded. *See United States v. Swift & Co.*, 286 U.S. 106, 114 (1932) (Even a consensual injunction may be "modif[ied] . . . in adaptation to changed circumstances."). And if this were to happen, whatever incremental benefit the Released Parties would have derived from an all-encompassing injunction would of course be nullified.

Finally, we point out that we previously made factual findings which some courts regard as pertinent to the validity of a non-debtor injunction. *See Findings of Fact and Conclusions of Law Regarding Confirmation of the Joint Plan of Reorganization*, at ¶¶ 21 - 25. *See In re A.H. Robins Co.*, 880 F.2d 709, 749 (4th Cir. 1989); *Robins I*, 880 F.2d at 702; *Johns-Manville*, 837 F.2d at 94; *Drexel Burnham Lambert*, 960 F.2d at 293; *Master Mortgage*, 168 B.R. at 935; *Heron*, 148 B.R. at 685, 689.[8] Our purpose in doing so

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[8] According to the cases upon which the Proponents rely, a court may enter a permanent post-confirmation injunction if these factors exist: (i) the third party has made an important contribution to the reorganization; (ii) the release and injunction are essential or important to the reorganization; (iii) a large majority of the impacted creditors has approved the plan containing the release and injunction; (iv) there is a close connection between the claims against the third party and the claims against the debtor; and (v) the plan provides for payment of substantially all of the claims affected by the release and injunction. Given all that precedes this, though, it is obvious that this Court believes that the factors more-or-less invented by these courts are irrelevant. If a court has no power to

is to obviate the need for remand in the event we are reversed on appeal with regard to the scope and permissibility of the release/injunction provisions. Another alternative is present. This Court demurs from entry of a broader injunction solely out of a belief that the law will not permit it. Judge Hood may be persuaded to withdraw the reference as to this issue and decide the matter differently. In such a case, the broader

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grant a form of relief, there are no factors which can justify it. Moreover, a couple of these findings seem largely pointless.

One, the "important-contribution" factor, *see Findings of Fact* at ¶ 21, is too vague to be useful. It also begs the more appropriate question, which is whether the "contribution[ ] . . . approximate[s] the value of the released claims." Brubaker, *Bankruptcy Injunctions*, 1997 U. Ill. L. Rev. at 992.

The other dubious factor goes to whether the non-debtor injunction is "important" to the reorganization effort. *Memorandum of Dow Corning Corporation and the Official Committee of Tort Claimants in Support of Confirmation and in Response to Objections to Confirmation*, filed June 1, 1999, at 3 (citing *Drexel Burnham Lambert*, 960 F.2d at 293). Again, this adjective is virtually meaningless because it can be so easily manipulated. Courts have unsurprisingly already slid down the slope to liberalize this "standard." *See* Brubaker, *Bankruptcy Injunctions*, 1997 U. Ill. L. Rev. at 1021-22 & nn.226-227. Indeed, "[i]f the reorganization policy is reduced to a simple estate-maximizing principle, then all that is required for approval of non-debtor releases is some contribution to the estate by the released non-debtor." *Id.* at 1019. A better formulation, and one which this Court adopted, *see Findings of Fact* at ¶ 22, would consider whether the injunction is "*essential* to reorganization." *Master Mortgage*, 168 B.R. at 935 (emphasis added).

injunction may issue from the District Court as an original matter.

B. Objections of the Pennsylvania Breast Implant Claimants

Jacqueline M. and Mark S. Toledo and Azure and Gary Verruni, as representatives of a group of claimants they refer to as "the Pennsylvania Claimants," objected to confirmation of the Plan. These objections related to the release provisions referred to above but specifically as they affect the lawsuits of the Pennsylvania Claimants against Pennsylvania physicians and other health care providers.

These objections were timely filed in April. But they were unaccompanied by a brief. On February 18, 1999, the Court had fixed April 26, 1999 as the deadline for the filing of memoranda in support of all objections. *See Scheduling Order No. 1 Regarding Confirmation Hearing*. The Pennsylvania Claimants filed no pre-trial memorandum at all, and they did not participate at the confirmation hearing. On September 8, 1999, over a month after the close of proofs and closing arguments, the Pennsylvania Claimants filed their "Memorandum of Law of the Pennsylvania Breast Implant Personal Injury Claimants in Support of Objections to Confirmation of the Amended Joint Plan of Reorganization." Clearly, this brief was untimely, and ought to be disregarded. One could also conclude that their failure to prosecute their objections was tantamount to a waiver. But their memorandum argued nothing new or different from what they asserted originally. And inasmuch as the arguments are unavailing in any event, we will consider them now.

It is difficult to cubbyhole their objections. In one breath they seem to be making an argument similar to that of the Nevada Claimants – that they are special because they have rights that personal injury claimants in other states lack. *See Memorandum of Law of the Pennsylvania Breast Implant Personal Injury Claimants* at 11 ("Pennsylvania law on informed consent differs significantly from those states which base their informed consent claims on negligence principles."). But they do not argue that the Plan misclassifies their claims. Furthermore, the memorandum fails to show that none of the other 49+ American jurisdictions shares Pennsylvania's allegedly peculiar notion of implied consent.

In the next breath, the Pennsylvania claimants assert that the Plan's treatment in §§ 1.101,[9] 8.3 and 8.5[10]

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[9] Section 1.101 as defined in the Amended Joint Plan:

> "***Malpractice Claims***" means Claims that are not affected by the releases of Steeling Physicians and Settling Health Care Providers under the Plan. Solely for purposes of Section 8.3 and 8.5 of the Plan, "Malpractice Claim" shall have the meaning given to that term by applicable non-bankruptcy law, except that it shall exclude those Claims by Personal Injury Claimants against Settling Physicians and Settling Health Care Providers that are based on, related to, arising out of, or derived from injuries, illnesses or conditions allegedly resulting from (i) characteristics or alleged characteristics (as defined below) of Breast Implants or Other Products (including component

parts thereof), silicone or other implant materials; (ii) failure to warn, make disclosure or provide adequate information to obtain informed consent, regarding the characteristics or alleged characteristics of Breast Implants, Other Products, silicone or other implant materials; or (iii) failure to use an alternative breast implant or other product, or sale, provision, distribution or selection of Breast Implants, Other Products, silicone or other implant materials, where the Claim is based on the characteristics or alleged characteristics of Breast Implants or Other Products. For the sole purpose of interpreting and applying this definition, the following are the "alleged characteristics of Breast Implants and Other Products:

(1) that gel can bleed or leak through the shell of the Breast Implant;
(2) that gel can migrate within body;
(3) that Breast Implant or Other Product materials will degrade or deteriorate;
(4) that Breast Implants can break or rupture even though they are not subjected to significant trauma, surgical or otherwise
(5) that Breast Implants impede detection of other diseases, including, without limitation, breast cancer; and
(6) that Breast Implants, Other Products, silicone or other implant materials cause diseases or combinations of conditions,

> symptoms or injuries, or are otherwise inherently defective.

Notwithstanding any of the foregoing, Malpractice Claims will not exclude claims for any injuries, diseases, illnesses or conditions allegedly resulting from or claimed as an element of damages in connection with (x) leakage or rupture of a Breast Implant or other complication or injury resulting from performance of implant surgery or other medical procedures in breach of the applicable standard of care; (y) express misrepresentation of the risks disclosed in the applicable product inserts necessarily constitutes a breach of the applicable standard of care or a failure to obtain informed consent; or (z) the implantation of loose silicone gel by the Settling Physician.

[10] Section 8.5 of the Amended Joint Plan, in relevant part, says:

> **Channeling Injunction for Certain Claims.**
>
> Claims, if any, asserted by Non-Settling Personal Injury Claimants against the Settling Physicians and the Settling Health Care Providers (other than Malpractice Claims) shall be subject to the channeling injunction provisions of this section 8.5 in the event that jurisdiction over such Claims is transferred, as Claims "related to" this Case, to the District Court. If such transfer is not effected, the relief provided in this section is not effective as to Claims that are not transferred, and such Claims shall be resolved by the procedures applicable in

"impermissibly and unfairly limits the rights of the Pennsylvania Claimants." Although they do not assert that their rights are different than those possessed by citizens of other states, the Pennsylvania Claimants also argue that the Plan impermissibly prejudices their causes of action against Pennsylvania-based Settling Physicians[11] and Settling Health Care Providers[12] for negligent selection of a defective product. In essence, the Pennsylvania Claimants assert that the Plan's provisions for releases of their claims against Settling Physician Claimants is illogical, and there is no "rational basis for their inclusion in the Amended Plan." *Memorandum* at 21.

> the courts where actions based on such Claims have been (or may be) filed. In the event that any such Claims against a Settling Physician or Settling Health Care Provider are transferred to the District Court for liquidation, they shall be subject to the following Claims resolution procedures. . . .

[11] Defined at § 1.162 of the Plan as "the Physicians in Class 12 who timely elect to settle their Claims against the Debtor, together with those Physicians who do not timely elect to litigate the allowability of their Claims against the Debtor."

[12] Defined at § 1.159 of the Plan as "the Health Care Providers in Class 13 who timely elect to settle their Claims against the Debtor, together with those Health Care Providers who do not timely elect to litigate the allowability of their claims against the Debtor."

The objection is devoid of citation to any provision of the Bankruptcy Code which is allegedly violated by the parts of the Plan found offensive by the Pennsylvania Claimants. So we are left to guess at what, aside from their simple displeasure with the Plan, the legal issue is. The closest to a legal objection is that the Plan does not satisfy § 1129(a)(1). But, as stated above, those Pennsylvania Claimants who accepted the Plan have also accepted the Plan's terms about releasing claims against Settling Physicians. And, since those Pennsylvania Claimants who rejected the Plan have not released the Settling Physicians, it seems that they have nothing about which to complain.

The Pennsylvania Claimants' assertions that Pennsylvania law is somehow peculiar or idiosyncratic adds nothing to the issue of the validity of the releases or the power of the Court to enforce them by injunction. Accordingly, the Court's more generic comments regarding the scope of the release and injunction provisions suffice.

C. Objections of the Official Committee of Unsecured Creditors

1. Section 502

The U/S CC, objected to confirmation of the Plan on a variety of grounds. This part of the opinion deals solely with the Committee's argument that permitting the Debtor, pursuant to provisions of the Plan, to settle and pay personal injury tort claims without the Court first ruling on the Committee's objections to these claims deprives it of its statutory right to object to claims in violation of § 502. According to the U/S CC this means, says the Committee,

that the Plan does not comply with applicable provisions of title 11 and so does not satisfy § 1129(a)(1).

Relying on *National Boulevard Bank v. Drive-In Dev. Corp.* (*In re Drive-In Dev. Corp.*), 371 F.2d 215, 219 (7th Cir. 1966); *Schreibman v. Walter E. Heller & Co.*, 446 F. Supp. 141, 144 (D. P.R.), *aff'd sub nom. Las Colinas Dev. Corp. v. Schreibman*, 577 F.2d 723 (1st Cir. 1978); *In re Charter Co.*, 68 B.R. 225, 228 (Bankr. M.D. Fla. 1986); and *In re Levy*, 54 B.R. 805, 807-08 (Bankr. S.D. N.Y. 1985), the Committee asserts that § 502 gives it the right, as a "party in interest," to object to the personal injury claims filed in this case and to have the Court rule on its objections, even though the Debtor, as the debtor-in-possession, filed omnibus objections to these claims upon which it has even moved for summary judgment. As explained below, under the particular circumstances of this case, the U/S CC did not have the right to file objections to the product liability claims in the first place. It, therefore, does not have a right to have the Court rule on those objections before payments are made on these claims.

Section 502 provides, in relevant part:

> (a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.
>
> (b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this

> section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount . . . .

11 U.S.C. §§ 502(a)-(b).

While the U/S CC is a "party in interest" under § 502 with the right to object to other creditors' claims, it is well-settled that the right nevertheless has limits. Even the cases cited by the U/S CC in support of its position recognize that

> [m]ost courts . . . have limited the right of a general creditor to object to the claim of another creditor in certain instances in order to promote a more orderly administration of the estate, i.e., in cases where a trustee has been appointed to represent the interests of all general unsecured creditors.

Charter, 68 B.R. at 227 (citing *Schreibman*, 446 F. Supp. at 144 ("It is a well settled rule that creditors cannot object to the claims of other creditors in straight bankruptcy proceedings. This is so because in such proceedings it is the duty of the trustee to represent all the creditors and object [to] the allowance of such claims as may be improper. Under such a situation a creditor would lack standing to object to such claims.") (citations omitted); and *Drive-in*, 371 F.2d at 219 ("The rule requiring that the trustee initially object to the allowance of a claim in ordinary bankruptcies is a procedural rule evolved by the courts. Since the trustee is the

representative of the creditors, it is a rule developed for the orderly administration of estates.")). A respected authority on bankruptcy echoes this rule:

> There is no doubt that the phrase "parties in interest" in section 502(a) applies to those who have some interest in the assets of the debtor being administered in the case. Under such definition, the debtor's creditors are the primary parties in interest. In fact, the right of a creditor to object to the allowance of another creditor's claim should be undisputed on principle. *Yet the needs of orderly and expeditious administration do not permit the full and unfettered exercise of such right . . . [I]t is the trustee who acts as the spokesman for all creditors in discharge of the trustee's duty unless the trustee refuses to take action.*

4 *Collier on Bankruptcy*, ¶ 502.02[2][d], at 502-15 (emphasis added) (relying in part on *Fred Reuping Leather Co. v. Fort Greene Nat'l Bank*, 102 F.2d 372, 372-73 (3d Cir. 1939)). The Advisory Committee Note to F. R. Bank. P. 3007, which covers the procedure for objecting to claims, likewise speaks of limiting creditors' role in the claims objection process:

> While the debtor's other creditors may make objections to the allowance of a claim, the demands of orderly and expeditious administration have led to a recognition that the right to object is generally exercised by the trustee. Pursuant to § 502(a) of the Code, however, any party in interest may object to a

> claim. But under § 704 the trustee, if any purpose would be served thereby, has the duty to examine proofs of claim and object to improper claims.

Id. at 502-15 n.17; *see also Charter*, 68 B.R. at 227; *In re Simon*, 179 B.R. 1, 7 (Bankr. D. Mass. 1995). ("If every creditor were entitled to challenge the claim of another creditor filed in a particular case, an orderly administration could degrade to chaos.") (citing *Norton Bankruptcy Code Pamphlet*, Editor's Comment to Fed. R. Bankr. P. 3007 (1994-95)). For this policy reason, most courts, including those cited by the U/S CC, hold that where a trustee is charged with administering a bankruptcy estate, a creditor can object to the claim of another creditor only if, upon demand, the trustee refuses to do so and the court grants the creditor the right to act on behalf of the trustee. *See, e.g., Fred Reuping*, 102 F.2d at 372-73; Charter, 68 B.R. at 227; *Simon*, 179 B.R. at 6-7; *Kowal v. Malkemus* (*In re Thompson*), 965 F.2d 1136, 1147 (5th Cir. 1992). *Cf., e.g. Canadian Pacific Forest Prods. Ltd. v. J.D. Irving, Ltd.* (*In re Gibson Group, Inc*), 66 F.3d 1436 (6th Cir. 1995) (A creditor has only derivative standing to pursue a preference or fraudulent transfer action.); *Louisiana World Exposition v. Federal Insurance Co.*, 858 F.2d 233, 247 (5th Cir. 1988) (requiring a creditors' committee to show that the claim is colorable, that the debtor-in-possession refused unjustifiably to pursue the claim, and that the committee first received leave from the bankruptcy court to sue). *See also In re Valley Park, Inc.*, 217 B.R. 864, 866-69 (D. Mont. 1998); *Unsecured Creditors Committee v. Farmers Savings Bank* (*In re Toledo Equipment Co.*), 35 B.R. 315, 320 (Bankr. N.D. Ohio 1983); *In re Colfor, Inc.*, No. 96-60306, 1998 WL

70718, at *1 (Bankr. N.D. Ohio Jan. 5, 1998); *Official Committee of Unsecured Creditors of the Florida Group, Inc. v. First Union National Bank of Florida* (*In re Florida Group*, Inc.), 124 B.R. 923, 924-25 (Bankr. M.D. Fla. 1991); *Chemical Separations Corp. v. Foster Wheeler Corp.* (*In re Chemical Separations Corp.*), 32 B.R. 816, 818 (Bankr. E.D. Tenn. 1983).

The result is, of course, the same in a chapter 11 case where the debtor fills the role of trustee. 11 U.S.C. § 1107(a).

Therefore, despite §§ 1109(b) and 1103(c)(5), for the U/S CC to have the right to object to the breast-implant claims, it had to have made a demand of the Debtor to object to these claims which the Debtor refused. That is clearly not the case here. The Debtor filed an omnibus objection to the breast-implant claims on its own initiative. Later, the U/S CC filed its own objection to these same claims on the same basis. The Plan expressly preserves these objections. Under these circumstances, no useful purpose would be served in allowing the U/S CC to pursue its own objections to these claims. Conversely, allowing such a course of action would waste judicial resources and delay administration of the bankruptcy estate to its and its creditors' detriment with no corresponding benefit to the estate. This would undermine the articulated policy concern of an orderly and efficacious administration of the bankruptcy estate. Accordingly, the Court holds that the U/S CC's objections to the personal injury claims are not properly before it, and require no further action. As a result, this objection to confirmation is overruled.

The U/S CC also argues that "given the structure of the Plan, no court will ever pass on whether these "settlements" satisfy the requirements of Rule 9019. And according to the Committee, this is contrary to established law that (i) settlements of claims must be evaluated by the court under the "fair and equitable" standard embodied in Rule 9019, whether the settlement is separate from or incorporated into a plan of reorganization; (ii) the parties proposing the settlement bear the burden to establish that the Rule 9019 standards are met; (iii) the court has an independent obligation to review the proposed settlement and exercise independent judgment as to whether it meets the applicable standards; and (iv) the settlement must be "fair and equitable" for nonsettling parties. *Memorandum of U/S CC in Support of Its Objections to Confirmation*, at 25.

The Committee asserts, incorrectly, that a bankruptcy court must independently review each settlement contained within a plan of reorganization for fairness and equity. Its sole support for this argument is *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-54 (1968). That case is not on point.

Although *TMT Trailer* involved the approval of a compromise which formed part of a reorganization plan, the statute then in effect (Chapter X of the Bankruptcy Act, 11 U.S.C. § 101, *et seq.*, repealed) required the bankruptcy court to determine that the plan was fair and equitable in every case. Under the current chapter 11, the requirement that a court examine the fairness and equity of each particular settlement bound up in a reorganization plan has been omitted. Under the Code, the court looks into the fairness and

equity of a plan only when a class of claims or interests has rejected it. *See* 11 U.S.C. § 1129(b). Inasmuch as Class 4 has rejected the Plan, it is this Court's duty to examine whether the Plan's treatment overall is fair and equitable as to claims in that class. This we have done in a separate opinion. Accordingly, the Committee's objections that the Plan improperly permits a settlement of personal injury claims without a separate fair-and-equitable determination is overruled.

2. Delay in Paying Claims

The U/S CC also argued that the Plan does not comply with the applicable provisions of the Bankruptcy Code because of the "potential for impermissible delays in distributions [to Class 4 claimants] under [the] Plan." *Objections of the Official Committee of Unsecured Creditors Under § 1129(a) of the Bankruptcy Code to Confirmation of the Amended Joint Plan of Reorganization* at 11. However, the U/S CC's memorandum in support of its objections lacked any argument on this issue. Accordingly, for the reasons noted previously, we conclude that the Committee waived its right to challenge confirmation based on this issue. Once again, though, even were we to consider the objection on the merits, the result would not change.

Section 1129(a)(1) requires that the Plan comply with all applicable Code provisions. Therefore, to state a cognizable violation of § 1129(a)(1), the U/S CC must delineate a provision of the Bankruptcy Code with which the Plan fails to comply. The U/S CC has failed to do so.

The U/S CC does not specify, (and the Court is unaware of), any Bankruptcy Code provision that is violated by plan terms that require distributions only on allowed claims and that permit the withholding of payments on claims subject to a legitimate dispute and ongoing litigation until a final determination on the allowance of the claims. To the contrary, this is standard practice in the litigation context both inside and outside of bankruptcy. Accordingly, this § 1129(a) objection to confirming the Plan is overruled.

D. Objection of the Texas Comptroller of Public Accounts

The Texas Comptroller of Public Accounts ("Texas Comptroller") argues that the Plan does not comply with § 1123(a)(5)(G), which requires that a plan provide adequate means for implementation, because it does not specify what remedies the Comptroller will have in the event the Reorganized Debtor defaults on its priority tax obligations.

The frivolous and nonsensical nature of the Texas Comptroller's "failure to provide a remedy in the event of default" objection was recently addressed by this Court in *Xofox, supra* p. 3. That case involved an identical objection by the State of Michigan's Department of Treasury. The Court observed that, pursuant to § 1141(a), the confirmation of a plan creates a legally binding agreement. *Id.* The terms of that agreement can be enforced in any court of competent jurisdiction. As a result, it is unnecessary for a plan to state that a taxing authority has the ability to enforce a debtor's plan obligations in a state court of competent jurisdiction. For these reasons, the Texas Comptroller's objection is overruled.

E. Objection of Certain Brazilian Claimants

Without specifying that § 1129(a)(1) was their focus, certain Brazilian Claimants argued that the Plan's treatment of attorney's fees of settling personal injury claimants is improper. The Court can conceive of no other place to consider this than in an opinion on whether this term "complies with the applicable provisions of . . . title [11]."

The Brazilian Claimants worry that this provision could "drive a wedge between claimants and their attorneys." They state that they "are very concerned about this intrusion upon their legal representation." *Objection of the Brazilian Claimants* at 8-9.

These claimants have nothing to fear in this regard. They have two options. First, if they wish, they can always honor their retainer agreements notwithstanding the protection that the Plan seeks to afford them. Second, they can factor this complication into their decision on whether to resolve their claims in the Litigation Facility or the Settlement Facility. Each claimant will have a myriad of factors to consider on this important choice; whether a rift might open with her counsel if she chooses the Settlement Facility is just one of them.

As for the actual merits of the objection, the Brazilian Claimants fail to cite any case law in support of their position. More importantly, they fail to identify a Bankruptcy Code provision that would be violated by such a limit on attorneys

fees.[13] Consequently, this provision does not support a denial of confirmation.

F. Objection of Certain Spouses of Breast-Implant Claimants

Attorney Alan B. Morrison, representing several spouses of breast-implant claimants, asserts that the Plan's provisions for their claims violates several sections of title 11. The Plan provides that personal injury claimants may liquidate their claims by suing the Litigation Facility. *Plan*, § 5.4.2; *see also Litigation Facility Agreement*. Claims for loss of consortium by spouses of implant claimants would also be litigated in the same manner as they would outside of bankruptcy. These claimants make no objection to this provision.

However, they do object to the Plan's treatment of their claims in the event that their spouses opt out of the Litigation Facility and settle their claims in the Settlement Facility. The Plan provides that the "option to settle Consortium Claims shall be controlled by and be subject to the election of the Breast Implant Claimant." ¶ 1.1(B)(5)(a). It further states that "any and all Consortium Claims related to that Primary Claimant shall be deemed settled and discharged for no additional compensation regardless of whether the [spouse] elects or would have elected to litigate his or her Consortium Claim separately." *Id.* The Plan

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[13] For what it is worth, it appears that federal courts do have the authority to modify contingency fee agreements. *See Green v. Nevers*, 111 F.3d 1295, 1302-03 (6th Cir. 1997).

explains the underlying rationale for this provision by saying that the monetary award received by the settling implant claimant is "intended to cover both the primary claimant and the related consortium claims." *Id.*

These objectors flail about, arguing that the provision is "fundamentally unfair" to them and that the Plan ought to be written differently. *Objections to Reorganization Plan of Breast Implant Claimants Rita Altig and Others*, ("*Morrison Objections*") at 9. No doubt had they been the drafters of the Plan, it would have been written differently. But the Plan was painstakingly negotiated over a lengthy period by bitter adversaries, and this Plan is what resulted. The issue is whether the provisions in question comply with title 11. Unfortunately, the objectors cite no provision of title 11 (but for § 1129(b)'s absolute priority principle)[14] allegedly violated by this Plan term.

The Plan provides for the payment of consortium claims. If the primary implant claimant chooses to litigate, if there is also a loss-of-consortium claim, it, too, will be tried. And consortium claims will be paid in full if a plaintiff's judgment results. Consortium claims will also be paid by the Settlement Facility.

These objectors would prefer a model whereby the husband and the wife can make independent decisions about settlement. *Morrison Objections*, at 7-8, 11-12. But that

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[14] Section 1129(b) does not apply to their claims because the classes in which their claims are classified overwhelmingly accepted the Plan.

ivory-tower model doesn't exist even outside bankruptcy. A defendant is unlikely to settle part of a lawsuit: If both the wife-plaintiff and the husband-plaintiff do not agree to settle, there will be no settlement. The Plan – proposed by the TCC as well as the Debtor – takes the reasonable and efficient view that the family should divide the award the way it sees fit. And it makes eminently good sense for the bankruptcy estate and the Reorganized Debtor to stay out of the marital affairs of the hundreds of thousands of claimants.[15] While these objectors may prefer their model, the Plan's methodology is not prohibited by title 11.

Accordingly, the Plan complies with the applicable provisions of the Code.

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[15] While these objectors parade hypothetical horrible examples which might arise from the Plan's methodology, *see Morrison Objections* at 7-8, they overlook the horribles which their own scheme might produce. They posit a plan in which the husband and the wife can separately decide to settle or not. They neglect to recognize that such a plan would not likely contain (as this one does) a standing, open offer to implant claimants who qualify for a fixed benefit to simply come and get it. As noted in text, the plan would more likely propose a settlement only if both spouses agree so that one cannot settle while the other goes and litigates. In that world, an estranged or ex-husband of a primary claimant can extort the primary claimant by simply being recalcitrant. Or, in a fit of spite, he might simply veto any settlement no matter how reasonable to him or to the primary claimant just to make her suffer years of litigation hell.

/s/ _____
ARTHUR J. SPECTOR
U.S. Bankruptcy Judge

Dated : December 21, 1999.

APPENDIX H

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

Case No. 95-20512
Chapter 11

[Filed November 30, 1999]

In re: DOW CORNING CORPORATION,	)
	)
Debtor.	)
	)

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING CONFIRMATION OF THE JOINT PLAN OF REORGANIZATION

Pursuant to F.R.Bankr.P. 7052, the Court enters the following findings of fact and conclusions of law with respect to the contested matter of the confirmation of the Amended Joint Plan of Reorganization dated February 4, 1999, as modified on July 28, 1999 and supplemented on July 30, 1999 ("Plan") of the Debtor and the Official Committee of Tort Claimants, hereafter jointly referred to as the "Proponents." Any finding of fact shall constitute a finding of fact even if it is stated as a conclusion of law, and any conclusion of law

shall constitute a conclusion of law even if it is stated as a finding of fact.

On June 28, 1999, this Court commenced the hearing to consider confirmation of the Plan as then formulated. The Court reviewed and considered: the Joint Plan; the Disclosure Statement; the Plan Documents; the pleadings and memoranda filed in connection with the confirmation issues, including all objections to confirmation and responses thereto; the testimony of witnesses, the exhibits and other evidence received at the confirmation hearing; and the many arguments relating thereto.

Preliminary conclusions of law:

A. The United States District Court for the Eastern District of Michigan has jurisdiction over this case and the matter of the confirmation of the Plan pursuant to 28 U.S.C. §1334(a).

B. The District Court referred its jurisdiction over bankruptcy cases generally, including this case, as permitted by 28 U.S.C. §157(a) by E.D. Mich. LR 83.50.

C. This is a core proceeding. 28 U.S.C. §157(b)(2)(L).

D. The form, content and manner of notice provided in connection with the Plan afforded due process, including adequate notice and opportunity to be heard to all known and unknown claimants and to all other parties whose rights are or may be affected by the Plan, and satisfied the requirements

of the United States Constitution, the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure.

Findings of fact:

1. The Proponents comply with the applicable provisions of title 11 of the United States Code. 11 U.S.C. §1129(a)(2). See the separate opinion to be issued later for further explication of this finding.

2. The Plan has been proposed in good faith and not by any means forbidden by law. 11 U.S.C. §1129(a)(3). See the separate opinion issued contemporaneously herewith entitled "Opinion on Good Faith" for further explication of this finding.

3. Any payment made or to be made by the Proponents or by a person issuing securities or acquiring property under the Plan, for services or for costs and expenses in or in connection with the case, or in connection with the Plan and incident to the case, has been approved by, or is subject to the approval of, the Court as reasonable. 11 U.S.C. §1129(a)(4).

4. The Proponents have disclosed the identities and affiliations of any individuals proposed to serve, after confirmation of the Plan, as directors, officers, or voting trustees of the Debtor or a successor to the Debtor under the Plan. 11 U.S.C. §1129(a)(5)(A)(i).

5. The appointment to, or continuance in, such office of the individuals referred to in the previous finding is

consistent with the interests of creditors and equity security holders and with public policy. 11 U.S.C. §1129(a)(5)(A)(ii).

6. The Proponents have disclosed the identities of any insiders that will be employed or retained by the Reorganized Debtor, and the nature of any compensation for such insiders. 11 U.S.C. § 1129(a)(5)(B).

7. There is no governmental regulatory commission with jurisdiction, after confirmation of the Plan, over the rates of the Debtor. 11 U.S.C. §1129(a)(6).

8. With respect to each impaired class of claims or interests, each holder of a claim or interest of such class has accepted the Plan; or will receive or retain under the Plan on account of such claim or interest property of a value, as of the effective date of the Plan, that is not less than the amount that such holder would so receive or retain if the Debtor were liquidated under chapter 7 of this title on such date. 11 U.S.C. §1129(a)(7). See In re Dow Corning Corp., 237 B.R. 380, 34 B.C.D. 982 (Bankr. E.D. Mich. 1999) with respect to claims in Class 4, and the separate opinion to be issued later with respect to claims in other classes.

9. Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the Plan provides that, with respect to a claim of a kind specified in §§507(a)(1) or 507(a)(2) of title 11 United State Code, on the effective date of the Plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim. 11 U.S.C. §1129(a)(9)(A). See the separate opinion issued contemporaneously herewith entitled

"Opinion on 11 U.S.C. §1129(a)(9) Objections" for further explication of this finding.

10. Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the Plan provides that, with respect to a class of claims of a kind specified in 11 U.S.C. §§507(a)(3), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7), each holder of a claim of such class will receive, if such class has accepted the Plan, deferred cash payments of a value, as of the effective date of the Plan, equal to the allowed amount of such claim; or if such class has not accepted the Plan, cash on the effective date of the Plan equal to the allowed amount of such claim. 11 U.S.C. §1129(a)(9)(B).

11. Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the Plan provides that, with respect to a claim of a kind specified in 11 U.S.C. §507(a)(8), the holder of such claim will receive on account of such claim deferred cash payments, over a period not exceeding six years after the date of assessment of such claim, of a value, as of the effective date of the Plan, equal to the allowed amount of such claim. 11 U.S.C. §1129(a)(9)(C). See the separate opinion issued contemporaneously herewith entitled "Opinion on 11 U.S.C. §1129(a)(9) Objections" for further explication of this finding.

12. At least one class of claims that is impaired under the Plan has accepted the Plan, determined without including any acceptance of the Plan by any insider. 11 U.S.C. §1129(a)(10).

13. Confirmation of the Plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the Debtor or any successor to the Debtor under the Plan. 11 U.S.C. §1129(a)(11). See separate opinion to be issued later for further explication of this finding.

14. All fees payable under 28 U.S.C. §1930, as determined by the Court at the hearing on confirmation of the Plan, have been paid or the Plan provides for the payment of all such fees on the effective date of the Plan. 11 U.S.C. §1129(a)(12).

15. The Plan provides for the continuation after its effective date of payment of all retiree benefits, as that term is defined in 11 U.S.C. §1114, at the level established pursuant to subsection 11 U.S.C. §1114(e)(1)(B) or 11 U.S.C. §1114(g), at any time prior to confirmation of the Plan, for the duration of the period the Debtor has obligated itself to provide such benefits. 11 U.S.C. §1129(a)(13).

16. Not every impaired class of claims or interests accepted the plan. 11 U.S.C. §1129(a)(8).

17. The Proponents requested the Court to confirm the Plan notwithstanding the failure to satisfy 11 U.S.C. §1129(a)(8). 11 U.S.C. §1129(b)(1).

18. With respect to Class 4, the Plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the Plan, equal to the allowed amount of such claim. 11 U.S.C. §1129(b)(2)(B)(i).

19. With respect to Class 15, the Plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the Plan, equal to the allowed amount of such claim. 11 U.S.C. §1129(b)(2)(B)(i).

20. With respect to Class 18, the Plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the Plan, equal to the allowed amount of such claim. 11 U.S.C. §1129(b)(2)(B)(i).

21. The Settling Physicians, the Settling Insurers, Corning, Inc. and The Dow Chemical Company will all make important contributions to the reorganization as part of a confirmed Plan.

22. The release and injunction provisions with respect to the Settling Physicians, Settling Insurers, Corning, Inc. and The Dow Chemical Company are essential to reorganization pursuant to this Plan.

23. A large majority of the creditors impacted by the release and injunction provisions approved the Plan.

24. There is a close connection between the claims of the Settling Physicians, the Settling Insurers, Corning, Inc. and The Dow Chemical Company on the one hand and the claims against the Debtor on the other hand.

25. The Plan provides for the payment of all of the claims affected by the release and injunction provisions of the Plan.

Conclusions of law:

D. The Plan complies with the applicable provisions of title 11 United States Code. 11 U.S.C. §1129(a)(1). See separate opinion to be issued later with respect to this issue.

E. With respect to Class 4, the Plan does not discriminate unfairly. 11 U.S.C. §1129(b)(1).

F. With respect to Class 15, the Plan does not discriminate unfairly. 11 U.S.C. §1129(b)(1). See separate opinion, entitled "Cramdown of Class 15," issued contemporaneously herewith, for further explication of this conclusion.

G. With respect to Class 18, the Plan does not discriminate unfairly. 11 U.S.C. §1129(b)(1). See separate opinion, entitled "Cramdown of Class 18," issued contemporaneously herewith, for further explication of this conclusion.

H. The Plan is fair and equitable with respect to Class 4. See separate opinion, entitled "Cramdown of Class 4," issued contemporaneously herewith, for further explication of this conclusion.

I. The Plan is fair and equitable with respect to Class 15. See separate opinion, entitled "Cramdown of Class 15," issued contemporaneously herewith, for further explication of this conclusion.

J. The Plan is fair and equitable with respect to Class 18. See separate opinion, entitled "Cramdown of Class 18,"

issued contemporaneously herewith, for further explication of this conclusion.

K. Classes 1, 2, 3, 4B, 22 and 23 are unimpaired and therefore have accepted the Plan. 11 U.S.C. §1126(f).

/s/ _____
ARTHUR J. SPECTOR
U.S. Bankruptcy Judge

Dated : November 30, 1999

APPENDIX I

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

Case No. 95-20512
Chapter 11

[Filed November 30, 1999]

In re: DOW CORNING CORPORATION,	)
Debtor.	)

ORDER CONFIRMING AMENDED JOINT PLAN OF REORGANIZATION AS MODIFIED

Findings of Fact and Conclusions of Law regarding confirmation of the Amended Joint Plan of Reorganization, dated February 4, 1999 (as modified on July 28, 1999 and supplemented on July 30, 1999), proposed jointly by Dow Corning Corporation and the Official Committee of Tort Claimants were entered today. This order is set forth as a separate document as mandated by F.R.Bankr.P. 9021. As stated in the Findings and Conclusions, the Court has determined that the Plan complies with the requirements of §1129 of the Bankruptcy Code, and therefore,

IT IS ORDERED as follows:

1. The Plan, including its attached and incorporated separate agreements, compromises, settlements, and assumptions and rejections of executory contracts and unexpired leases, is confirmed.

2. Prior to the occurrence of the Effective Date, the Proponents (and following the Effective Date, the Reorganized Debtor) and their directors, officers, attorneys, agents and representatives are authorized and empowered to take all actions necessary or appropriate to consummate the transactions contemplated by the Plan and the Plan Documents, and to perform thereunder. The chief executive officer and any other authorized officer of the Reorganized Debtor (or the Debtor) is authorized and empowered, without the necessity of any further order, to enter into, execute and deliver the Plan Documents in substantially the form submitted, subject to such amendments as may be agreed to by the parties thereto or approved by this Court at the Proponents' request provided such amendments shall be consistent with the Plan.

3. Upon the Effective Date, the Reorganized Debtor is authorized and empowered to operate and conduct its business and to dispose of its property without further approval of this Court, the District Court or the MDL 926 Court, except as otherwise provided in the Plan or the Plan Documents.

4. All objections to Personal Injury Claims, including without limitation the Debtor's Omnibus Disease Objection to Breast Implant Claims, the Debtor's Omnibus Supplemental

Objection to Implant Claims, and the Official Committee of Unsecured Creditors' Objection to Personal Injury Claims, upon the Effective Date, are hereby denied with respect to any Settling Personal Injury Claim. The objection of the Unsecured Creditors' Committee is also, upon the Effective Date, hereby declared to be moot with respect to any Settling Personal Injury Claimant. Nothing contained in this paragraph shall waive or modify any of the requirements (including without limitation the eligibility requirements under the Dow Corning Settlement Program and Claims Resolution Procedures ("CRP")) applicable to Settling Personal Injury Claimants under the Plan or the Plan Documents.

5. A. Confidentiality as to the identities of Personal Injury Claimants who filed proofs of claim is hereby maintained pending each Claimant's decision to elect settlement or litigation. The names of all Claimants who elect or are deemed to have elected to participate in the Settlement Facility shall remain confidential, subject to application (on notice to the Claimants' Advisory Committee) to the MDL Court by parties with a demonstrated need to obtain information regarding settling Personal Injury Claimants. The determination as to whether to maintain confidentiality with respect to such application shall be within the sole discretion of the MDL Court. Claimants electing to proceed in the Litigation Facility shall cease to be protected by the Confidentiality Order.

B. By December 24, 1999, the Debtor shall mail to each Personal Injury Claimant a notice: (i) summarizing the provisions of this paragraph 5; (ii) informing them that beneficiaries of the United States Government who received medical care or reimbursement for medical care expenses

from certain agencies or programs of the United States Government, such as the Veterans Administration, the Bureau of Indian Affairs, the Department of Defense, and Medicare, may have a duty to notify the Government upon settlement of any claim against the Debtor or the Reorganized Debtor and to share such settlement amount with the Government, and (iii) advising them that Claimants may wish to seek legal counsel or the assistance of the Claimants' Advisory Committee with respect to this issue.

C. Personal Injury Claimants obligated by law to inform the United States Government of a settlement with the Debtor shall notify the Government by letter addressed to: Glenn Gillett, Department of Justice, P.O. Box 875, Ben Franklin Station, Washington, D.C., 20044, within 24 hours of the time that the Claimant and the Settlement Facility agree to a settlement amount.

D. Personal Injury Claimants shall have until February 25, 2000 to withdraw their proofs of claim and to thereby preserve confidentiality as to them. By doing so, however, they forfeit their right to participate in any recovery from the estate or the Reorganized Debtor.

E. Commencing March 1, 2000, the United States of America may examine and copy at its own expense proofs of claim of all Personal Injury Claimants which have not been withdrawn, but subject to the following restrictions with respect to the claims of Personal Injury Claimants who elect to settle within the Settlement Facility: (i) the information contained on proofs of claim shall be available only to those persons within the Government having a need to know; and (ii) the Government may not release such information to any

person outside of the Government (whether or not requested under the Freedom of Information Act or other provision of law) except other parties in this case who already have access to the same information. This order shall be deemed to be merely a modification of the existing confidentiality orders of this Court.

6. Non-Settling Claims in Class 11 under the Plan will not be estimated for distribution purposes on or before the Effective Date. Claims in Classes 15 and 17 under the Plan will not be estimated for distribution purposes on or before the Confirmation Date. All such claims are channeled to the Litigation Facility for liquidation, and, if allowed, payment subject to the terms of the Settlement Facility Agreement and the Funding Payment Agreement.

7. Except as provided in (i) the Funding Payment Agreement, (ii) the Insurance Allocation Agreement, (iii) the Settlement Agreement with Hoechst Marion Roussel, Inc. approved by the Court on January 25, 1996, and (iv) certain agreements entered into by the Debtor and certain objectors to the Plan and approved by the Court, resolving objections to confirmation of the Plan, upon the Effective Date, (a) no person or entity shall have or retain any claim or rights in or to amounts paid or payable to Dow Corning by the Settling Insurers (which are identified on Exhibit A to the Notice of Modification of Amended Plan of Reorganization filed on July 28,1999), and (b) Insurance proceeds and other monies paid by the Depository Trust for the benefit of the Settlement Facility shall be and hereby are deemed to be free and clear of any lien, claim, or encumbrance by any third-party.

8. Except for the matters over which the MDL 926 Court is assigned jurisdiction under the Plan and the Plan Documents (including, without limitation, supervision of the Settlement Facility), the Bankruptcy Court and, as applicable, the District Court shall retain exclusive jurisdiction over all matters specified in §8.7 of the Plan.

9. The automatic stay under §362(a) of the Bankruptcy Code remains in effect until the Effective Date and shall terminate automatically, and without any further action by this Court, upon the Effective Date.

10. Notwithstanding the Bar Order establishing the Bar Date, subject to the occurrence of the Effective Date, claims against the Debtor that were not filed on or before the Bar Date are deemed to be timely-filed claims, provided that: (i) such claims are filed on or before the Confirmation Date (or are filed on or before 60 days after the mailing by the Debtor of notice of the provisions of this paragraph in the circumstances described in the immediately following sentence), and (ii) in all other respects, such claims are properly filed in accordance with prior orders and notices of the Court. Each person who has filed on or before the Confirmation Date either a motion or letter to the Court seeking an extension of the Bar Date or leave to file a late claim, or a notice of intent pursuant to F.R.Bankr.P. 3005, shall have 60 days from the mailing by the Debtor to such person of notice of the provisions of this Paragraph 10 within which to file his or her proof of claim. Any claims for which proofs of claim are not so filed shall be forever barred, and the holders of such claims shall have no rights on account of such claims against the Debtor, its estate, the Reorganized Debtor, the Settlement Facility or the Litigation Facility.

Claimants who have not (or are not deemed to have) timely filed their claims, shall continue to have the rights provided in Section 2.02(b) of the CRP relating to claims that may have been filed on their behalf under F.R.Bankr.P. 3005, which rights shall remain unaffected by this paragraph.

11. Pursuant to §6.6 of the Plan, a request for the payment of an Administrative Expense, other than one arising in the ordinary course of the Debtor's business, shall be filed and served as required by the Third Amended Case Management and Administrative Order (as it may be amended) no later than 75 days after the Effective Date. The Administrative Expense of any person who fails to so file a request for payment by such date shall be forever barred. This paragraph does not affect the right of certain parties to submit requests for payment based on a "substantial contribution" to the case, as provided in §9.02 of the CRP. This Court will establish the procedures and deadlines for making such requests for payment, and will decide them pursuant to 11 U.S.C. §503(b).

12. Any third-party paying agent charged with making distributions to holders of public debt instruments issued by the Debtor or the Reorganized Debtor (including, if applicable, the Indenture Trustees therefor) shall inform the Reorganized Debtor on a quarterly basis after the Effective Date (or any other periodic basis agreed to by the Reorganized Debtor and such paying agent, or as ordered by this Court) as to the identity of the persons, including the holders of Public Debt Claims, who are entitled to unclaimed distributions with respect to their claims. Based upon such information, the Reorganized Debtor shall file with this Court on the second, third and fourth anniversaries of the Effective

Date, a list of persons who are entitled to unclaimed distributions in respect thereof. The ownership and payment of such unclaimed distributions, and the rights of the affected claimant, the Debtor and the Reorganized Debtor with respect thereto, shall be governed by the provisions of §11.3 of the Plan.

13. Confirmation of the Plan pursuant to this Order shall not modify the treatment of proof of claim number 03754111-00 filed by Hilti, Inc. as provided in the Stipulation and Order Resolving General Unsecured Non-Priority Claims of Hilti, Inc. and Hilti Construction Chemicals, Inc., entered in this case on September 20, 1999 (docket #20624).

14. Not later than 30 days after the Effective Date, the Reorganized Debtor shall file with the Court a certificate confirming that the Effective Date has occurred, with notice thereof to be given as required by F.R.Bankr.P. 2002(f). Such notice shall also state the Interest Rate for the Senior Notes, as determined in accordance with the rate-setting mechanisms provided in the Plan.

/s/ _____
ARTHUR J. SPECTOR
U.S. Bankruptcy Judge

Dated: November 30, 1999.

APPENDIX J

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

CASE NO. 95-20512
(CHAPTER 11)

[Filed February 4, 1999]

IN RE:	)
	)
DOW CORNING CORPORATION	)
	)
DEBTOR	)
	)

BEFORE
Judge Arthur J. Spector

AMENDED JOINT PLAN OF REORGANIZATION

INTRODUCTION

Dow Corning Corporation, a Michigan corporation, the Debtor in the above-captioned chapter 11 Case, and the Official Committee of Tort Claimants (the "**Tort Committee**") propose the following Amended Joint Plan of Reorganization pursuant to the provisions of chapter 11 of the Bankruptcy Code.

For purposes hereof, any term used in an initially capitalized form in this Plan of Reorganization shall have the defined meaning ascribed to it in either section 101 of the Bankruptcy Code or Article One hereof unless the context otherwise requires.

Reference is hereby made to the Disclosure Statement, as hereinafter defined, of the Debtor, which discusses the history of the Debtor, its business, management, properties, and other assets. The Disclosure Statement also provides a summary of this Plan. **YOU ARE URGED TO READ THE DISCLOSURE STATEMENT WITH CARE IN EVALUATING HOW THIS PLAN WILL AFFECT YOUR CLAIM(S).**

ARTICLE EIGHT
EFFECTS OF PLAN CONFIRMATION

8.1 **Discharge.** Except as otherwise expressly provided in this Plan or in the Confirmation Order, on the Effective Date the Debtor shall be discharged from and its liability shall be extinguished completely in respect of any Claim and Debt, whether reduced to judgment or not, liquidated or unliquidated, contingent or noncontingent, asserted or unasserted, fixed or not, matured or unmatured, disputed or undisputed, legal or equitable, known or unknown, that arose from any agreement of the Debtor entered into or obligation of the Debtor incurred before the Confirmation Date, or from any conduct of the Debtor prior to the Confirmation Date, or that otherwise arose before the Confirmation Date, including, without limitation, all interest, if any, on any such Claims and Debts, whether such interest accrued before or after the date of commencement of the

Case, and including, without limitation, all Claims and Debts based upon or arising out of Breast Implant Claims, Other Products Claims, Raw Material Breast Implant Claims, Miscellaneous Raw Material Claims, LTCI Claims, and from any liability of the kind specified in sections 502(g), 502(h), and 502(i) of the Bankruptcy Code, whether or not a proof of claim is filed or is deemed filed under section 501 of the Bankruptcy Code, such Claim is Allowed under section 502 of the Bankruptcy Code, or the holder of such Claim has accepted this Plan.

Without limiting the generality or effect of the foregoing, on the Effective Date, all Existing Debt Instruments shall be deemed canceled, extinguished, retired and of no further force and effect, in all events without any further action on the part of the Debtor or any other entity. The holders of Existing Debt Instruments shall thereafter have no rights arising from or relating to such Existing Debt Instruments, except the rights provided pursuant to this Plan; *provided, however*, that no distribution under this Plan shall be made to or on behalf of the holder of any Allowed Claim evidenced by such Existing Debt Instruments unless or until such Existing Debt Instruments are surrendered to the Reorganized Debtor pursuant to, or the holder has otherwise complied with, section 10.6 of this Plan.

8.2 **Vesting.** Except as otherwise expressly provided in this Plan or in the Confirmation Order, on the Effective Date the Reorganized Debtor shall be vested with all of the property of the estate free and clear of all Claims, Liens, encumbrances, charges and other interests of Creditors and Shareholders, and shall thereafter hold, use, dispose or otherwise deal with such property and operate its business

free of any restrictions imposed by the Bankruptcy Code or by the Court. All Debtor Actions and, except to the extent the same are transferred to the Settlement Facility or the Litigation Facility, all Insurance Debtor Actions are hereby preserved for the benefit of the Reorganized Debtor, the proceeds of which shall be used, as necessary for funding obligations to either the Settlement Facility or the Litigation Facility, except as otherwise provided in settlements approved by prior order of the Court or approved by the Court in connection with confirmation of this Plan. Prosecution and settlement of the Debtor Actions and the retained interest in any Insurance Debtor Actions shall be the exclusive responsibility of the Reorganized Debtor. The Reorganized Debtor shall have sole and absolute discretion over whether to prosecute or settle such causes of action.

8.3 **Release.** Except as otherwise expressly provided in this Plan and in this section 8.3, in consideration of (a) the promises and obligations of the Debtor-Affiliated Parties under the Plan, including the establishment and funding of the Settlement Facility, the Litigation Facility, the Quebec Class Action Fund, the Ontario Class Action Fund, the B.C. Class Action Fund and the Australia Breast Implant Optional Settlement Fund, (b) the undertakings of the Shareholders pursuant to section 6.16 of the Plan, (c) the undertakings of the Settling Insurers pursuant to their respective settlements with the Debtor, and (d) the release of Claims against the Debtor-Affiliated Parties by the Settling Physicians and Settling Health Care Providers, on the Effective Date (i) all Persons who have held, hold, or may hold Products Liability Claims, whether known or unknown, shall be deemed to have forever waived and released all such rights or Claims, whether based upon tort or contract or otherwise, that they

heretofore, now or hereafter possess or may possess against the Debtor-Affiliated Parties, the Shareholder-Affiliated Parties, the Settling Insurers, and, to the extent released by the Debtor under the settlement agreements with such Settling Insurers, the respective predecessors, successors, officials, shareholders, subsidiaries, divisions, affiliates, representatives, attorneys, merged or acquired companies or operations or assigns of the Settling Insurers, and (ii) all Persons who hold, may hold or may have held Personal Injury Claims shall be deemed to have forever waived and released all such rights or Claims, whether based upon tort or contract or otherwise, that they heretofore, now or hereafter possess or may possess against the Settling Physicians (except for Malpractice Claims) or the Settling Health Care Providers (except for Malpractice Claims) (all such parties released by this section 8.3, including, without limitation, the Debtor-Affiliated Parties, the Shareholder-Affiliated Parties, the Settling Insurers and, to the extent released by the Debtor under the settlement agreements with such Settling Insurers, the respective predecessors, successors, officials, shareholders, subsidiaries, divisions, affiliates, representatives, attorneys, merged or acquired companies or operations or assigns of the Settling Insurers, and, except for Malpractice Claims, the Settling Physicians and Settling Health Care Providers, being collectively called the "**Released Parties**"), in each case based upon or in any manner arising from or related to (v) the raw materials and/or finished products manufactured or distributed by the Debtor, including a Breast Implant, an Other Product, an LTCI Product, or the raw materials comprising part of a Non-Dow Corning Breast Implant or a Non-Dow Corning Implant, (w) the research and development, manufacture, distribution, advertisement, sale, provision, recommendation, insertion,

use or removal of any raw materials and/or finished products manufactured or distributed by the Debtor, including a Breast Implant, an Other Product, an LTCI Product or the raw materials comprising part of such products or a Non-Dow Corning Breast Implant or a Non-Dow Corning Implant, (x) the processing, adjustment, settlement, payment, defense, negotiation or handling of any Claims, demands, suits, causes of action or proceedings, based upon or relating in any way to any raw materials and/or finished products manufactured or distributed by the Debtor, including a Breast Implant, an Other Product or an LTCI Product, or the raw materials comprising part of a Non-Dow Corning Breast Implant or a Non-Dow Corning Implant, (y) the failure to warn, disclose or provide information concerning, the alleged fraud or misrepresentation regarding, or the failure to take remedial action with respect to, any raw materials and/or finished products manufactured or distributed by the Debtor, including a Breast Implant, an Other Product or an LTCI Product, or the raw materials comprising part of a Non-Dow Corning Breast Implant or a Non-Dow Corning Implant, or (z) contingent Claims against any of the Released Parties for liability, if any, otherwise arising from the future payment by the Debtor, the Reorganized Debtor or either the Settlement Facility and the Litigation Facility in potential derogation of the lien rights or rights of subrogation held with respect to the Claims of any direct Claimant against any of the Released Parties, including, without limitation, (a) those for death or personal injuries, including emotional distress, (b) those of any Person against whom any Claim, demand, proceeding, suit or cause of action based upon or in any manner arising from or relating to any of the matters enumerated or described in (v), (w), (x), (y) and/or (z) above has been or may be asserted (including, without limitation, rights of indemnity,

whether contractual or otherwise, contribution Claims and subrogation Claims), (c) those for damages, including punitive damages, (d) those for attorneys' fees and other expenses, fees or costs, (e) those for any possible economic loss or loss of consortium, (f) those for damages to reputation, and (g) those for any equitable remedy.

The parties who are Released Parties in this section 8.3 shall be deemed released by the Quebec Class Action Settlement Claimants, the Ontario Class Action Settlement Claimants, the B.C. Class Action Settlement Claimants and the Australia Breast Implant Settlement Claimants, and shall be entitled to receive executed releases pursuant to, respectively, the Quebec Breast Implant Settlement Agreement, the Ontario Breast Implant Settlement Agreement, the B.C. Class Action Settlement Agreement and the Australia Breast Implant Settlement Option.

Except as otherwise expressly provided in this Plan and the Plan Documents, the release under this section 8.3 shall further operate, as between all Released Parties, as a mutual release of all Products Liability Claims, including, but not limited to, all Claims between any Shareholder-Affiliated Parties. Further, save and except for the preservation of all rights in insurance arrangements described below, Dow Corning shall be deemed to have released any Claims for contribution or indemnity it may have against any of the Released Parties. However, the release under this section 8.3 will not affect contribution, indemnity, subrogation, or other claims of non-settling Insurance Companies against Settling Insurers.

This section 8.3 shall not operate as a release or waiver of any Malpractice Claim held against a Settling Physician or a Settling Health Care Provider by a Settling Personal Injury Claimant. Malpractice Claims, if any, asserted by Settling Personal Injury Claimants shall be resolved in the courts where actions based on such Claims have been (or may be) filed. Moreover, this section 8.3 shall not operate as a release or waiver in favor of the Settling Physicians and the Settling Health Care Providers of the rights or Claims of Non-Settling Personal Injury Claimants. Such rights and Claims shall be preserved, subject to section 8.5 of this Plan. This section 8.3 shall not operate as a release or waiver of those Claims preserved under the Domestic Health Insurer Settlement Agreement.

Further, this section 8.3 and the injunction contained in section 8.4 are not intended to release, impair or otherwise affect the terms of any Coverage-in-Place Policies or other undertakings of any of the Settling Insurers under their respective settlement agreements with the Debtor, or to release, impair or otherwise affect the rights of the Shareholder-Affiliated Parties in respect of any policy of insurance, except as expressly set forth (a) in the orders entered by the Court with respect to the settlement agreement between the Debtor and a Settling Insurer or (b) in the settlement described in section 6.2 of this Plan.

The Representatives of the Debtor, the Joint Ventures and the Subsidiaries shall be deemed indemnified and held harmless by the Reorganized Debtor with respect to the Claims hereby released to the fullest extent available under applicable statute and the bylaws of the Reorganized Debtor.

The foregoing release provisions are an integral part of this Plan and are essential to its implementation.

8.4 **Permanent Injunction Against Prosecution of Released Claims.** Except as otherwise expressly provided in this Plan, for the consideration described in section 8.3 above, on the Effective Date all Persons who have held, hold, or may hold Released Claims, whether known or unknown, and their respective agents, attorneys, and all others acting for or on their behalf, shall be permanently enjoined on and after the Effective Date from (a) commencing or continuing in any manner, any action or any other proceeding of any kind with respect to any Released Claim against the Debtor-Affiliated Parties, the Shareholder-Affiliated Parties, the Settlement Facility, the Litigation Facility, the Settling Physicians, the Settling Health Care Providers, the Settling Insurers, and, to the extent released by the Debtor under the settlement agreements with such Settling Insurers, the respective predecessors, successors, officials, shareholders subsidiaries, divisions, affiliates, representatives, attorneys, merged or acquired companies or operations or assigns of the Settling Insurers, or any Representative of each such party (collectively, the "**Parties**") or the property of the Parties, (b) seeking the enforcement, attachment, collection or recovery by any manner or means of any judgment, award, decree, or order against the Parties or the property of the Parties, with respect to any Released Claim, (c) creating, perfecting, or enforcing any encumbrance of any kind against the Parties or the property of the Parties with respect to any Released Claim, (d) asserting any setoff, right of subrogation, or recoupment of any kind against any obligation due to the Parties with respect to any Released Claim, and (e) taking any act, in any manner and in any place whatsoever, that does not

conform to or comply with provisions of this Plan, or the Settlement Facility Agreement and the Litigation Facility Agreement. Notwithstanding this section 8.4, each Non-Settling Personal Injury Claimant shall be entitled to continue or commence an action against the Litigation Facility in which the Non-Settling Personal Injury Claimant shall be entitled to a jury trial for the sole purpose of obtaining a judgment as permitted by the Litigation Facility Agreement, thereby liquidating such Non-Settling Personal Injury Claimant's Claim so that it may be paid with other Allowed Personal Injury Claims in the ordinary course of the operations of the Litigation Facility, consistent with the provisions of the Litigation Facility Agreement. The holder of any such judgment shall be enjoined from executing against the Litigation Facility or its assets.

In the event any Person takes any action that is prohibited by, or is otherwise inconsistent with the provisions of sections 8.3 or 8.4 of this Plan, then, upon notice to the Court by an affected Released Party, the action or proceeding in which the Claim of such Person is asserted shall automatically be transferred to the Court (or, as applicable, the District Court) for enforcement of the provisions of sections 8.3 and 8.4 of this Plan.

The foregoing injunctive provisions are an integral part of this Plan and are essential to its implementation.

APPENDIX K

LIST OF NEVADA CLAIMANT'S

CLAIMANT	CLAIM NUMBER
Atkins, Tina	0292763-00
Butler, Laura	0216343-00
Callos-Puliti, Gloria	0216339-00
Chealander, Lauren	0292760-00
Chirstensen, Cheri	0292765-00
Christy, Sherann	0197158-00
Collins, Theresa	0216345-00
Cox, Alice	0216342-00
(Ellington), Tejeda Carole	0272496-00
Garrett, Robin	0203727-00
Golden, Cheryl	0272497-00
Griffin, Sandra	0203726-00
Green, Cynthia	0272508-00
Hill, Sandra	0233325-00
Howard, Lorraine	0233314-00
Estate of Iacometti, Ruth	0203723-00
Jabs, Frances	0197156-00
Latham, Joan	0203726-00
Lee, Deborah	0197154-00
Lee, Janice	0203725-00
Lieb, Judy	0197155-00
Long, Donna	0203722-00
Lyons, Patricia	0197153-00

CLAIMANT	CLAIM NUMBER
Marazzani, Lorraine Estate Of	0197152-00
Matteri, Joine	0216349-00
McDorman, Claudia	0580166-00
Montgomery, Diane	0216350-00
Nalls, Bessie	0233312-00
O'Brien, Gayle	0233322-00
Pope, Barbara	0197144-00
Potter, Pattie	0203720-00
Putvin, Bertha	0215351-00
Ramzi, Nannette	0292762-00
Reznick, Jayne	0272496-00
Roland-Liles, Jody	0197150-00
Seagraves, Gerre	0216353-00
Shaw, Shirley	0216354-00
Silvey, Maralyn	0197149-00
Slaughter, Virginia	0202730-00
Smith, Barbara	0197148-00
Smith, Charlotte	0233323-00
Smith, Lucille	0202731-00
Smith, Vicki	0216355-00
Steinberger, Mary	0292769-00
Stewart, Janet	0233321-00
Szcotka, Nora	0272502-00
Thrailkill, Irene	0272493-00
Tidwell, Thelma	0272512-00
Torino, Patricia	0233320-00
Torri, Joyce	0272501-00
Vanderhoef, Victoria	0197147-00
Weigl, Tamaree	0216356-00
Williams, Tiffany	0272510-00
Wilson, Fay	0197146-00
Young, Kim	0233317-00

APPENDIX L

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 99-CV-75924-DT

[Filed November 13, 2000]

In Re:	)
DOW CORNING CORPORATION,	)
Debtor,	)
	)
	)
CLASS FIVE NEVADA CLAIMANTS	)
Appellants,	)
	)
v.	)
	)
DOW CORNING CORPORATION and	)
OFFICIAL COMMITTEE OF TORT	)
CLAIMANTS,	)
Appellees.	)

Before
Honorable Denise Page Hood

ORDER OF DISMISSAL

On this date, the Court entered an Opinion Relating to Appeals From and Motions Regarding the Bankruptcy Court's November 30, 1999 Confirmation Order. On April 12 and 13, 2000, hearings were held on the matter. For the reasons set forth in the Opinion Relating to Appeals From and Motions Regarding the Bankruptcy Court's November 30, 1999 Confirmation Order,

IT IS ORDERED, the Bankruptcy Court's November 30, 1999 Confirmation Order is AFFIRMED.

IT IS FURTHER ORDERED that this Appeal is DENIED and DISMISSED.

/s/ _____
DENISE PAGE HOOD
United States District Judge

DATED: November 13, 2000

APPENDIX M

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN

Case No. 95-20512
Chapter 11

[Filed June 24, 1999]

In Re:	)
DOW CORNING CORPORATION,	)
Debtor	)
	)
	)

Before
Judge Arthur J. Spector

AMENDED NOTICE OF FINAL RESULTS OF BALLOTING ON AMENDED JOINT PLAN OF REORGANIZATION

TO THE HONORABLE ARTHUR J. SPECTOR, UNITED STATES BANKRUPTCY COURT, AND OTHER PARTIES IN INTEREST:

Dow Corning Corporation and the Official Committee of Tort Claimants file this Amended Notice of Final Results of Balloting on Amended Joint Plan of Reorganization, and state as follows:

Attached hereto as Exhibit A is a chart that sets forth the final results of balloting on the Amended Joint Plan of Reorganization, as reported by Corporate Election Services, the official balloting agent appointed by the Bankruptcy Court in this case. This notice amends the notice filed on June 1 by including the number of claimants eligible to vote in each class.

Dated: June 24, 1999.

Respectfully submitted,

SHEINFELD, MALEY & KAY, P.C.

By: /s/ _____

Barbara J. Houser
1700 Pacific Avenue, Suite 4400
Dallas, Texas 75201-4618
Telephone: (214) 953-0700
Facsimile: (214) 953-1189

ATTORNEYS FOR DOW CORNING CORPORATION

KRAMER LEVIN NAFTALIS & FRANKEL LLP

By: /s/ _____

Kenneth H. Eckstein
919 Third Avenue
New York, New York 10022-3850
Telephone: (212) 715-9100
Facsimile: (212) 715-8000

ATTORNEYS FOR OFFICIAL COMMITTEE OF TORT CLAIMANTS

Bankruptcy Court Amended Notice - 6/24/99

DOW CORNING CORPORATION

AMENDED OFFICIAL VOTING RESULTS BY PLAN CLASS

FOLD-OUT EXHIBIT

0411

DOW CORNING CORPORATION
AMENDED OFFICIAL VOTING RESULTS BY PLAN CLASS
Reflects Valid Ballots Received by the Voting Deadline (May 14, 1999)

Class	ELIGIBLE		TOTAL BALLOTS CAST		ACCEPTING				REJECTING				Plan Class Results
	Number To Vote	Dollars/Shares To Vote	Number Cast	Dollars/Shares Cast	Number of Votes Cast	%	Dollars/Shares Cast	%	Number of Votes Cast	%	Dollars/Shares Cast	%	
4 Unsecured (Non-Tort) Claims	1,098	1,109,982,587	592	765,919,053	420	70.9	81,593,822	10.7	172	29.1	684,325,231	89.3	FAILED *
4A Prepetition Judgement Claims	6	9,285,087	4	7,540,087	2	50.0	0	0.0	2	50.0	7,540,087	100.0	FAILED *
5 Domestic Breast Implant	175,679	175,679	112,775	112,775	107,661	95.5	107,661	95.5	5,114	4.5	5,114	4.5	PASSED
6.1 Foreign Breast Implant Cat 1 & 2	14,023	14,023	9,404	9,404	7,424	78.9	7,424	78.9	1,980	21.1	1,980	21.1	PASSED
6.2 Foreign Breast Implant Cat 3 & 4	9,438	9,438	6,193	6,193	4,073	65.8	4,073	65.8	2,120	34.2	2,120	34.2	FAILED *
6A Quebec Class Action Claimants	8,636	8,636	6,870	6,870	6,844	99.6	6,844	99.6	26	0.4	26	0.4	PASSED
6B Ontario Class Action Claimants	8,405	8,405	5,999	5,999	5,932	98.9	5,932	98.9	67	1.1	67	1.1	PASSED
6C BC Class Action Claimants	8,327	8,327	3,880	3,880	3,862	99.5	3,862	99.5	18	0.5	18	0.5	PASSED
6D Australia Class Action Claimants	5,737	5,737	3,104	3,104	3,097	99.8	3,097	99.8	7	0.2	7	0.2	PASSED
7 Silicone Material Claims	203,950	203,950	112,154	112,154	106,437	94.9	106,437	94.9	5,717	5.1	5,717	5.1	PASSED
8 Misc Raw Material Claims	37,032	37,032	19,563	19,563	18,151	92.8	18,151	92.8	1,412	7.2	1,412	7.2	PASSED
9 Domestic Other Products	76,670	76,670	43,452	43,452	42,549	97.9	42,549	97.9	903	2.1	903	2.1	PASSED
10.1 Foreign Other Products Cat 1 & 2	10,940	10,940	4,994	4,994	4,896	98.0	4,896	98.0	98	2.0	98	2.0	PASSED
10.2 Foreign Other Products Cat 3 & 4	630	630	334	334	281	84.1	281	84.1	53	15.9	53	15.9	PASSED
11 Co-Defendant Claims	23	23	13	13	13	100.0	13	100.0	0	0.0	0	0.0	PASSED
12 Physician Claims	1,726	1,726	534	534	488	91.4	488	91.4	46	8.6	46	8.6	PASSED
13 Health Care Provider Claims	580	580	163	163	154	94.5	154	94.5	9	5.5	9	5.5	PASSED
14 Domestic Health Insurer Claims	918	918	814	814	813	99.9	813	99.9	1	0.1	1	0.1	PASSED
14A Foreign Health Insurer Claims	7	7	2	2	2	100.0	2	100.0	0	0.0	0	0.0	PASSED
15 Government Payer Claims	14	14	8	8	3	37.5	3	37.5	5	62.5	5	62.5	FAILED *
16 Shareholder Claims	3	69,859,660	2	69,859,660	2	100.0	69,859,660	100.0	0	0.0	0	0.0	PASSED
17 General Contribution Claims	106	567,959,296	58	474,159,272	56	96.6	474,159,271	100.0	2	3.4	1	0.0	PASSED
18 LTCI Personal Injury Claims	10,765	10,765	4,827	4,827	2,583	53.5	2,583	53.5	2,244	46.5	2,244	46.5	FAILED *
20 Intercompany Claims	50	25,970,952	47	25,930,331	47	100.0	25,930,331	100.0	0	0.0	0	0.0	PASSED
24 Interest Holders	2	2,500,000	2	2,500,000	2	100.0	2,500,000	100.0	0	0.0	0	0.0	PASSED
GRAND TOTAL	574,765	N/A	335,788	N/A	315,792	N/A	N/A	N/A	19,996	N/A	N/A	N/A	

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APPENDIX N

SUPREME COURT OF NEVADA

No. 28600

[Filed December 31, 1998]

THE DOW CHEMICAL COMPANY,
Appellant/Cross-Respondent,

v.

CHARLOTTE MAHLUM AND MARVIN S. MAHLUM,
Respondents/Cross-Appellants.

Appeal and cross-appeal from a judgment of the district court in an action for fraud and negligence, and appeal from an order of the district court denying a motion for a new trial. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

JUDGES:
ROSE, J. AMES, D. J., concurring. SPRINGER, C. J., concurring in part and dissenting in part. MAUPIN, J., with whom SHEARING, J., joins, concurring in part and dissenting in part.

OPINION

By the Court, ROSE, J.:

This is an appeal and cross-appeal from a judgment against the Dow Chemical Company ("Dow Chemical") for fraud and negligence in connection with alleged defects in silicone gel breast implants manufactured by Dow Corning Corporation ("Dow Corning").[1]

The issues before this court are whether substantial evidence in the record supports the jury verdict and whether a new trial was warranted based on numerous alleged trial errors. We conclude that the verdict in this case cannot stand as to the fraud and accessory liability claims. We also conclude, however, that the verdict as to the negligence claim is supported by substantial evidence. Accordingly, we reverse the district court's judgment in part and affirm it in part. In addition, we conclude that the district court did not abuse its discretion in denying Dow Chemical's new trial motion.

I. Background

In 1943, Dow Chemical and Corning Incorporated formed Dow Corning for the express purpose of developing

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[1] Although Dow Chemical also purports to appeal from the district court's order denying its alternative post-judgment motion for judgment notwithstanding the verdict, we have previously explained that no appeal may be taken from an order denying a post-judgment motion for judgment notwithstanding the verdict. *See, e.g., Uniroyal Goodrich Tire v. Mercer*, 111 Nev. 318, 320 n.1., 890 P.2d 785, 787 n.1. (1995).

commercial and industrial uses for silicone technology. Dow Chemical and Corning Incorporated were, and continue to be, Dow Corning's only stockholders, each owning fifty percent of Dow Corning's stock. Dow Chemical and Corning Incorporated each also initially occupied four of ten seats on Dow Corning's board of directors; later, each parent held five seats out of fifteen.

In 1948, Dr. V. K. Rowe, a toxicologist at Dow Chemical, co-authored an article entitled "Toxicological Studies on Certain Commercial Silicones," which was published in the Journal of Industrial Hygiene and Toxicology. The article, while addressing the hazards surrounding the workplace handling of silicones, concluded that commercial silicones as a group were physically "inert" and were very low in toxicity.

From the 1940s until the 1970s, "every organosilicon compound" made by Dow Corning was sent to Dow Chemical for toxicological testing. While the majority of these tests concerned industrial handling hazards associated with the tested substances, Dow Chemical reports periodically advised Dow Corning on adequate product warnings or on the need for further testing before marketing a particular product. The products containing such silicone ingredients included cosmetics, bathroom caulk, hair conditioner, and foot ointment.

In 1956, Dow Corning commissioned a study co-authored by Dow Chemical employee M. B. Chenoweth entitled "The Physiological Assimilation of Dow Corning 200 Fluid" ("the Chenoweth study"). This study, in its introductory paragraph, noted that prior Dow Chemical

experiments had shown that many silicones were inert, and that the increasing use of silicones for medicinal **[***5]** purposes had triggered a need for information on their biological ramifications. The study further revealed that Dow Corning 200 fluid ("DC 200"), when injected intramuscularly in rats and administered orally in dogs, had migrated to all major organs of the body, including the brain. (DC 200 fluid is chemically equivalent to the Dow Corning 360 fluid ("DC 360") used in the breast implants at issue in this case.) This study was not published to the medical or scientific community.

In 1957, Dow Corning requested Dr. Rowe to set up a study on six silicone materials submitted by Dow Corning. Dr. Rowe arranged for the study ("the Miami study") to be performed by a professor of pharmacology at the University of Miami School of Medicine, Dr. William Deichmann. Although Dr. Deichmann performed the testing, Dr. Rowe designed the testing protocol for the research (i.e., the number and type of test animals, the duration of the test, and the test methods).

Two versions of the Miami study were prepared by Professor Deichmann for Dow Corning on the same date. The first, entitled "Six Silicone Materials," reported that six silicone compounds (the first five of which were different concentrations of DC 200 and the sixth, a substance identified as "Z-4141") that were fed to male and female rats resulted in no deleterious effects, with the following exceptions: (1) all six compounds reduced the number of granulocytic (white blood) cells in the peripheral blood of female rats, (2) the livers of all the rats fed the sixth compound (Z-4141) were significantly heavier than those of the control rats, and (3) the

sixth compound induced a fatty infiltration or degeneration in the liver. The second version of the study, entitled "Five Silicone Materials," omitted all references to the sixth compound and its effects. The second version also explained that initial testing had suggested a depression in the number of leukocytes (white blood cells) in all female rats over a period of 90 days, but that subsequent work on control animals showed that silicone was not the cause of the decrease.

In 1959, Dow Corning established the non-profit Center for Aid to Medical Research, which provided the medical community with medical products and research regarding the uses of silicone for medical applications. In the early 1960s, Dr. Thomas Cronin, a plastic surgeon and researcher from Baylor University, approached Dow Corning about the possibility of using silicones in breast implants. In 1962, Dow Corning commenced clinical trials on silicone breast implants. Dow Corning sold $ 93,000.00 worth of breast implants in 1962.[2]

In 1964, Dow Corning formed its Medical Products Division. Also in 1964, Dow Chemical acquired a substantial interest in Gruppo Lepetit, an Italian pharmaceutical company that had, in some foreign countries, an exclusive distribution agreement with Dow Corning to market Dow Corning's medical line, including its breast implants. Lepetit sold Dow

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[2] There is conflicting evidence in the record regarding when Dow Corning began marketing its breast implants. While Dow Chemical maintains that initial sales began in 1964, testimony at trial suggested that Dow Corning began profiting from breast implants in 1962.

Corning breast implants outside the United States throughout Europe, South America, and Australia.

From its inception, Dow Corning has enjoyed physical proximity with Dow Chemical, being located just "across the road and down the way" in Midland, Michigan. In 1965, Dow Corning created a Bioscience Research Department to explore the potential biological activities of organosilicon compounds. The department was housed in the same building as Dow Chemical's toxicology and research laboratories until 1970. Until 1968, Dow Corning lacked its own toxicology laboratory and staff and relied on outside contract laboratories, such as Dow Chemical, for toxicological testing and information. Dow Corning scientists often sought input from Dr. Rowe and other Dow Chemical scientists regarding silicone technology and toxicological effects. In 1968, Dow Corning established its own toxicology laboratory, but for the first two years, it shared the same building as Dow Chemical's toxicology laboratory. Dow Corning continued thereafter to share laboratory facilities and animals with Dow Chemical, and its scientists continued to consult with Dow Chemical personnel regarding toxicological research. From 1968 until 1973, Dow Corning's new toxicology laboratory and staff were headed by a former Dow Chemical toxicologist, Kenneth Olson. In 1973, Olson returned to work for Dow Chemical; Olson testified that in his capacity as the chief toxicologist for Dow Corning, he likely knew that Dow Corning's breast implants contained silicone fluid as a component.

Dow Chemical was not the sole testing facility doing research for Dow Corning. Between 1964 and 1976, Dow Corning commissioned outside laboratories, often those

recommended by Dow Chemical, to conduct animal testing and long-term studies on breast implants and other silicone products. In 1967, Dow Corning entered into a joint research and development agreement with Dow Chemical "relating to the physiological effects resulting from ingestion or injection into the systems of animals or men of particular physiologically active silicones." The two companies also agreed to "jointly share the costs and . . . share the profits and losses of any commercialization."

Also in 1967, Dow Corning implemented a two-year study on miniature Silastic breast implants in dogs, conducted by an outside laboratory, the Food and Drug Research Laboratories, Incorporated ("FDRL"). An internal Dow Corning memorandum in 1967 referenced that Dr. Rowe was one of the consultants who recommended this study. Although the study appears to have been principally designed by FDRL, part of the testing protocol may have involved Dr. Rowe.

In 1970, Dow Corning enlisted Dow Chemical to conduct a pathology test on the biological effects of DC 360 fluid. Gary Sparschu, a Dow Chemical research pathologist, reported to Dow Corning that the tests showed the liquid silicone had migrated to major organs of the test animals, including the bone marrow, and that the fluid had decreased the brain weights of female rats in two test groups. This information was not shared with the scientific or medical community.

In 1975, Dow Chemical and Dow Corning entered into a trademark agreement wherein Dow Chemical granted Dow Corning the right to use its trade name "Dow" and trademark. In return, Dow Chemical obtained the right to

inspect Dow Corning's manufacturing processes to assure the quality of its products and to approve or disapprove any products manufactured, distributed or sold under the Dow Chemical trademark. This agreement also stated that "Dow Company and Corning Company formed [Dow Corning] in 1943 and since then have continuously owned or controlled equally all of the issued share capital of [Dow Corning], and have controlled its operations, including the quality of its goods and services."

Although Dow Corning began selling breast implants in 1962, the record is unclear as to the identity of the silicone fluid used in this early prototype. Dow Corning introduced the Silastic I breast implant, containing DC 360 fluid, in 1975 and the Silastic II breast implant, at issue in this case, in 1982. The Silastic II breast implant was marketed solely under Dow Corning's trademark and trade name, not Dow Chemical's.

In 1991, the United States Food and Drug Administration ("FDA") conducted a premarket approval program for all manufacturers who wished to continue marketing and distributing silicone gel implants. Dow Corning submitted its premarket approval application to the FDA. Subsequently, the FDA suspended the use of silicone gel implants for cosmetic or augmentation purposes because of concerns about their safety, and limited their use to urgent medical situations or limited clinical trials.

II. Facts and Procedural History

The matter at bar is one of many cases pending across the country wherein breast implant recipients have sued Dow

Chemical alleging that it is legally responsible for defects in Dow Corning's silicone breast implants.

In August 1985, as part of reconstructive surgery following a bilateral subcutaneous mastectomy, Charlotte Mahlum elected to receive silicone gel breast prostheses (hereinafter "breast implants"). Dow Corning manufactured the two Silastic II breast implants that Mahlum's surgeon implanted. The Silastic II implant is made up of several components. A clear outer shell of silicone rubber called an elastomer contains the silicone gel and is the protective barrier between the gel and the implant host. The silicone gel itself is comprised of eighty to eighty-five percent DC 360 silicone fluid.

In 1990, Mahlum's health began to deteriorate. In July 1993, one of Mahlum's breast implants ruptured, requiring the surgical removal of both implants. The surgeon was unable to remove all of the silicone gel from Mahlum's body, leaving approximately ten percent of the silicone materials embedded in muscle, tissue, and blood vessels under her arms and ribs. Mahlum's health continued to deteriorate after the explantation surgery.

In September 1993, Mahlum and her husband, Marvin Mahlum, filed suit against Dow Corning, Dow Chemical, and a number of other defendants, alleging that she had contracted an atypical autoimmune disease as a result of the rupture of one of her Silastic II breast implants. On May 15, 1995, Dow Corning petitioned for bankruptcy protection. In July 1995, the district court granted the Mahlums' motion to sever their claims against Dow Corning. (All defendants other than Dow Corning and Dow Chemical were dismissed prior to Dow

Corning's bankruptcy.) In October 1995, the Mahlums proceeded to trial solely against Dow Chemical.

At trial, the Mahlums sought to prove that Dow Chemical, by contributing technology and expertise at the time of Dow Corning's formation and by subsequently conducting or participating in testing of silicone products and materials, should be subject to direct causes of action with respect to products manufactured and distributed by Dow Corning. Specifically, the Mahlums alleged that Dow Chemical could be found directly liable for fraudulently concealing information about the dangers of silicone, conspiring with Dow Corning to effectuate such fraudulent concealment, aiding and abetting Dow Corning's fraudulent misrepresentations about silicone safety, acting in concert with Dow Corning to effectuate such fraudulent misrepresentation, and negligently performing an undertaking -- testing the toxicity of liquid silicone -- for Dow Corning. All of the Mahlums' tort claims were based, ultimately, on the assumption that Mahlum's injuries were proximately caused by defective silicone breast implants.

After a four-week trial, the jury returned a verdict against Dow Chemical on the claims of (1) fraudulent concealment, (2) aiding and abetting Dow Corning's fraudulent misrepresentation, (3) acting in concert with Dow Corning to commit fraudulent misrepresentation, and (4) negligent performance of an undertaking. The jury found in favor of Dow Chemical on the claim of conspiracy to commit fraudulent misrepresentation. The jury awarded Charlotte Mahlum $ 38,654.00 in past damages and $ 3,915,000.00 in future damages, and awarded Marvin Mahlum $ 200,000.00

in future damages. The jury also awarded the Mahlums $ 10,000,000.00 in punitive damages.

After judgment was entered on November 7, 1995, Dow Chemical filed a timely motion for judgment notwithstanding the verdict or, in the alternative, a new trial. On February 21, 1996, the district court denied these alternative motions.

Dow Chemical timely appealed to this court, challenging the judgment of the district court, and the district court's denial of its motion for a new trial. Specifically, Dow Chemical argues that (1) it is entitled to reversal of the Mahlums' judgment against it for fraudulent concealment, aiding and abetting Dow Corning, acting in concert with Dow Corning, and negligent performance of an undertaking, or, in the alternative, (2) a new trial is warranted as a result of numerous trial errors, including allegedly erroneous evidentiary rulings, improper jury instructions, and attorney misconduct. As an additional ground for new trial, Dow Chemical also argues that the compensatory damages award is excessive, and that the punitive damages award is constitutionally excessive.

Having considered the parties' appellate briefs, the amicus briefs, and the voluminous record, and having heard oral argument, we conclude that the judgment against Dow Chemical is infirm as to the intentional tort claims. Accordingly, we reverse the judgment against Dow Chemical on those claims. However, we also conclude that substantial evidence in the record supports the judgment against Dow Chemical on the claim of negligent performance of an

undertaking. Finally, we conclude that the district court did not err in denying Dow Chemical's motion for a new trial.

III. Discussion

A. Standard of review

In general, the jury's findings will be affirmed on appeal if they are based upon substantial evidence in the record. *Prabhu v. Levine*, 112 Nev. 1538, 1543, 930 P.2d 103, 107 (1996). "Substantial evidence has been defined as that which 'a reasonable mind might accept as adequate to support a conclusion.'" Id. (quoting *State, Emp. Security v. Hilton Hotels*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986)).

B. Causation

The Mahlums had to show that Dow Corning was negligent or manufactured unsafe, defective breast implants before showing that Dow Chemical was liable in conjunction with Dow Corning. The Mahlums pleaded both negligence and strict liability against Dow Corning, and under either theory they were obligated to demonstrate causation. See *Price v. Blaine Kern Artista, Inc.*, 111 Nev. 515, 518, 893 P.2d 367, 369 (1995) (causation is germane to both negligence and strict tort liability). Causation consists of two components: actual cause and proximate cause. *See Sims v. General Telephone & Electric*, 107 Nev. 516, 815 P.2d 151 (1991). To demonstrate actual cause with respect to Dow Corning's product, the Mahlums had to prove that, but for the breast implants, Charlotte Mahlum's illnesses would not have occurred. *Id.* at 524, 815 P.2d at 156. The second

component, proximate cause, is essentially a policy consideration that limits a defendant's liability to foreseeable consequences that have a reasonably close connection with both the defendant's conduct and the harm which that conduct created. *Id.*

We conclude that the Mahlums introduced substantial evidence that Dow Corning's defective breast implants caused her illnesses. The evidence demonstrated that Mahlum developed myriad illnesses following breast implant surgery. Silicone gel probably bled from the breast implants shortly after implantation, and Mahlum's left breast implant later ruptured and spilled silicone gel into her body. The explantation surgeon was unable to remove all of the silicone gel from Mahlum's chest, and left approximately ten percent of the silicone imbedded in muscle, tissue and blood vessels under her arms and ribs. Mahlum's health continued to deteriorate after the explantation surgery. By 1995, Mahlum experienced shaking spells, itching, tingling in her hands and feet, slurring of her speech, seizures, discoloration in her hands and legs, headaches, dry eyes, loss of hair, memory loss, sleeplessness, pain in her joints, armpits and chest, and loss of coordination. Later, she increasingly lost control of her muscles.

The Mahlums provided causation evidence in the form of expert testimony. Expert testimony is admissible if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue. NRS 50.275. Demonstrating causation in cases involving medical products often requires expert medical testimony. *See Prabhu*, 112 Nev. at 1544, 930 P.2d at 108 (proof of causation in medical malpractice cases may be

proved by expert testimony). Once the district court certifies an expert as qualified, the expert may testify to all matters within the expert's experience or training. *See Fernandez v. Admirand*, 108 Nev. 963, 969, 843 P.2d 354, 358 (1992). Here, the district court properly exercised its discretion to qualify several physicians as the Mahlums' expert witnesses to testify on the subject of her injuries and whether Dow Corning's implants caused those injuries.[3]

The Mahlums adduced sufficient evidence at trial for a jury to decide that Dow Corning's breast implants actually caused Mahlum's injuries. The trial evidence was substantial in showing that Mahlum's current health problems manifested themselves around the time the left breast implant ruptured and released its silicone gel into her body. Three expert witnesses, all board-certified medical doctors, including Mahlum's treating rheumatologist, testified that Mahlum's injuries were caused by her implants.

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[3] We have considered Dow Chemical's argument that this court should adopt the decision of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993), regarding the admissibility of scientific evidence. The interpretation of a federal counterpart to a Nevada rule of evidence may be persuasive, but is not controlling. *See Dougan v. Gustaveson*, 108 Nev. 517, 835 P.2d 795 (1992). We believe that the *Daubert* doctrine is a work in progress, and that we should observe the doctrine's further development in the federal courts before concluding that *Daubert* should be adopted as the law of this state. Above all, we do not presently perceive a need to adopt *Daubert*, based on our perception of developments in Nevada law, and we therefore decline to do so.

For example, Dr. Eric Gershwin, an immunologist from the University of California, Davis, and author of a number of articles about silicone and the immune system, testified that liquid silicone impairs the body's immune system. Liquid silicone, he testified, causes the body to create autoantibodies that attack the body's own organs and tissues. In essence, autoantibodies cause the human body to turn on itself. When silicone bleeds from the breast implant, it can enter the lymph nodes and from there travel to other organs, including the heart, the lungs, the nerves, and the brain. The lymph nodes try to cleanse the body of silicone oil, but cannot. Dr. Gershwin examined Charlotte Mahlum and testified that in her case, silicone had reached and reacted with her brain, demonstrated by an MRI (magnetic resonance imaging) of her brain that shows certain "punched-out" lesions. He also opined that silicone has damaged Mahlum's nerves and nerve sheaths (demyelinization), resulting in nerve disfunction. Mahlum also had increased levels of anti-GM-1 antibody, which Dr. Gershwin had seen in other women with silicone gel breast implants. In Dr. Gershwin's opinion, Mahlum suffered from a multiple-sclerosis-like disease and progressive dysfunction of the nerves, resulting from exposure to silicone. Mahlum also displayed many symptoms that other women with autoimmune diseases and silicone breast implants experience, including livedo reticularis (blotching of the skin), sicca symptoms (dryness of the eyes and mouth), aching muscles and joints, fatigue, loss of hair, memory problems, numbness, tremors, and seizures.

Dr. John Monroe Eaton, Charlotte Mahlum's treating neurologist, echoed many of Dr. Gershwin's conclusions, although he did not provide specific testimony that silicone caused Malhum's illnesses. Dr. Eaton testified that Mahlum's

symptoms corresponded to multiple-sclerosis-like autoimmune disease, axonal neuropathy, and demyelinization, all of which are caused by antibodies attacking her nervous system. He testified that the axon is like a wire that connects the brain to other parts of the body, and the myelin is the sheath around the nerve itself, like insulation around a wire. When the axon or the myelin is disturbed, many problems can occur, including loss of sensation/numbness, livedo reticularis, loss of muscle control, dryness of the eyes and mouth, shrinking muscles, and chorea (twitching). As previously noted, Charlotte Mahlum displayed these symptoms. Dr. Eaton further testified to Mahlum's raised antibody count, in addition to a "crawling" sensation under the skin that appears to be related to the nerve damage she had experienced. A majority of other silicone breast implant patients Eaton has treated experienced similar nervous system disorders and autoimmune diseases.

Dr. Steven Atcheson, a rheumatologist, observed Mahlum's symptoms and, based on his training and experience in treating over one hundred women who had silicone gel breast implants, concluded that the symptoms were caused in large part by exposure to silicone. Atcheson testified that women with breast implants displayed symptoms of fatigue, joint and muscle pain, sleep disturbances, hair loss, skin rashes, dryness of the eyes and mouth, and numbness or tingling in their hands and feet. These symptoms are part of what he terms "atypical autoimmune disease," which he believes can be caused by silicone gel breast implants. He has treated Charlotte Mahlum, and he noted that she shares many of the same symptoms as other women who have silicone gel breast implants.

Based upon the evidence discussed above, a reasonable jury could conclude that but for the breast implants, Mahlum would not have suffered from myriad illnesses.

Next, the Mahlums adequately demonstrated that Charlotte Mahlum's injuries were a foreseeable result of Dow Corning's sale of these products. Prior tests of DC 200 (chemically equivalent to DC 360 as used in Dow Corning's Silastic II breast implants) illustrated that silicone will migrate throughout a person's body, ultimately residing in various major organs and tissues, including the brain. Subcutaneous injections of DC 200 in rabbits showed inflammation at the injection sites after twenty-four hours. Tests of DC 200 on calf hides indicated damage to the calf hide after ten days. A test on DC 360 suggested that it decreased the white blood cell counts and changed liver and brain weights in rats. Evidence showed that Dow Corning was aware that the envelope containing the silicone gel had a tendency to bleed silicone into the patient's breast area. In light of the foregoing knowledge, it was foreseeable that the silicone used in breast implants was probably harmful to women.

Although Dow Chemical disputes the conclusions of the Mahlums' experts, the jury was entitled to rely on their testimony. This court has long adhered to the rule that when there is a conflict in the evidence, the verdict or decision will not be disturbed on appeal. *See, e.g., Frances v. Plaza Pacific Equities*, 109 Nev. 91, 94, 847 P.2d 722, 724 (1993). Stated differently, a jury's verdict will not be overturned if it is supported by substantial evidence unless the verdict was clearly erroneous when viewed in light of all the evidence presented. *Bally's Employees' Credit Union v. Wallen*, 105 Nev. 553, 779 P.2d 956 (1989). This verdict was not clearly

erroneous and is supported by substantial evidence that Dow Corning breast implants caused Mahlum's illnesses.

We are aware that causation is a scientifically controversial component of the plaintiff's case in breast implant litigation. The Mahlums, however, did not need to wait until the scientific community developed a consensus that breast implants caused her diseases. If she had, it might have been too late to recover, in light of the doctrine of laches and statutes of limitation and repose. The Mahlums' complaint was not tried in the court of scientific opinion, but before a jury of her peers who considered the evidence and concluded that Dow Corning silicone gel breast implants caused her injuries. The jury in this case was properly instructed to consider the proof by a preponderance of the evidence. There is no evidence that the jury did otherwise. Science may properly require a higher standard of proof before declaring the truth, but that standard did not guide the jury, nor do we use that standard to evaluate the judgment on appeal.[4] For the foregoing reasons, we therefore conclude that the Mahlums provided substantial evidence on the issue of causation.

C. Fraudulent Concealment

The jury found that Dow Chemical had fraudulently concealed the dangers of liquid silicone from Mahlum. To

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[4] We have no way of knowing what the outcome would have been had Dow Corning been present at trial. Neither the judgment in this case nor this decision should foreclose Dow Corning from a full and fair trial on the merits if the Mahlums continue to press their claims after Dow Corning emerges from bankruptcy.

establish a prima facie case of fraudulent concealment, a plaintiff must offer proof that satisfies five elements: (1) the defendant concealed or suppressed a material fact; (2) the defendant was under a duty to disclose the fact to the plaintiff; (3) the defendant intentionally concealed or suppressed the fact with the intent to defraud the plaintiff; that is, the defendant concealed or suppressed the fact for the purpose of inducing the plaintiff to act differently than she would have if she had known the fact; (4) the plaintiff was unaware of the fact and would have acted differently if she had known of the concealed or suppressed fact; (5) and, as a result of the concealment or suppression of the fact, the plaintiff sustained damages. *See Nevada Power Co. v. Monsanto Co.*, 891 F. Supp. 1406, 1415 (D. Nev. 1995).

The Mahlums alleged that Dow Chemical fraudulently and intentionally concealed the hazards of liquid silicone after it had "partially assumed" Dow Corning's duty to perform toxicological testing on liquid silicone. As a result, the Mahlums charged Dow Chemical with a duty to disclose publicly the alleged dangers of silicone implants because: it asserted long ago in published articles (e.g., Dr. Rowe's 1948 study, the 1956 Chenoweth study) that silicones as a class were inert; after performing toxicological testing on silicone for Dow Corning, Dow Chemical subsequently learned that certain silicone polymers were not inert; and Dow Chemical possessed superior knowledge about silicone safety yet, according to the Mahlums, it actively and intentionally suppressed this knowledge. The Mahlums also asserted that had Charlotte Mahlum been aware of the fraudulently concealed information, she would not have chosen to undergo the breast implantation surgery that caused her injuries.

Generally, an action in deceit will not lie for nondisclosure. *Epperson v. Roloff*, 102 Nev. 206, 213, 719 P.2d 799, 803 (1986). For a mere omission to constitute actionable fraud, a plaintiff must first demonstrate that the defendant had a duty to disclose the fact at issue. *See Monsanto*, 891 F. Supp. at 1417. Here, absent such a duty, Dow Chemical's failure to disclose any information it may have had about the adverse effects of liquid silicone and/or silicone breast implants would not constitute actionable fraud.

With respect to fraudulent concealment, a duty to disclose arises from the relationship of the parties. A fiduciary relationship, for instance, gives rise to a duty of disclosure. *See, e.g., Foley v. Morse & Mowbray*, 109 Nev. 116, 125-26, 848 P.2d 519, 525 (1993). A duty to disclose may also arise where the parties enjoy a "special relationship," that is, where a party reasonably imparts special confidence in the defendant and the defendant would reasonably know of this confidence. *See Mackintosh v. Jack Matthews & Co.*, 109 Nev. 628, 634-35, 855 P.2d 549, 553 (1993) (citing *Mancini v. Gorick*, 41 Ohio App. 3d 373, 536 N.E.2d 8, 10 (Ohio Ct. App. 1987)). A party's superior knowledge thus imposes a duty to speak in certain transactions, depending on the parties' relationship. "Nondisclosure will become the equivalent of fraudulent concealment when it becomes the duty of a person to speak in order that the party with whom he is dealing may be placed on an equal footing with him." *Mackintosh*, 109 Nev. at 634-35, 855 P.2d at 553 (quoting *Mancini*, 536 N.E.2d at 9-10). Even when the parties are dealing at arm's length, a duty to disclose may arise from "the existence of material facts peculiarly within the knowledge of the party sought to be charged and not within the fair and reasonable reach of the other party." *Villalon v. Bowen*, 70 Nev. 456,

467-68, 273 P.2d 409, 415 (1954) (failure of purported widow to tell the executor of her purported husband's estate that her prior marriage had not been terminated).

The duty to disclose requires, at a minimum, some form of relationship between the parties. *See Mackintosh*, 109 Nev. at 634-35, 855 P.2d at 553 (disclosure mandated in context of dealings between parties); *Villalon*, 70 Nev. at 467-68, 273 P.2d at 415 (same); *see also In re Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig.*, 113 F.3d 1484, 1497 (8th Cir. 1997) [hereinafter *TMJ Implants*] (without some kind of relationship, there can be no duty to disclose). Absent such a relationship, no duty to disclose arises, and as a result, no liability for fraudulent concealment attaches to the nondisclosing party.

It is undisputed that Dow Chemical did not have a fiduciary relationship, a special relationship, or a relationship of any kind with the Mahlums. Instead, the Mahlums claim that Dow Chemical's duty to disclose arose because it possessed superior knowledge about the dangers of using silicone within the human body. Dow Chemical had no duty to disclose to the Mahlums any superior knowledge it may have had regarding the safety of silicone products, however, because it was not directly involved in the transaction from which this lawsuit arose, or any other transaction with the Mahlums. Accordingly, we conclude that the portion of the judgment holding Dow Chemical liable for fraudulent misrepresentation was not supported by evidence of any relationship between the parties and must be reversed.

D. Accessory Liability

The jury also found that Dow Chemical (1) aided and abetted Dow Corning to engage in fraudulent misrepresentation and (2) acted in concert with Dow Corning to commit fraudulent misrepresentation.[5]

The trial court's jury instruction followed section 876 of the Restatement (Second) of Torts. The Restatement provides:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he
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> (a) does a tortious act in concert with the other or pursuant to a common design with him, or

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[5] Dow Chemical contends that reversal is warranted because this court has never recognized a civil cause of action for aiding and abetting or concert of action. We disagree. The fact that this court has not previously recognized a cause of action will not warrant reversal where that claim is well grounded in the common law. *See* NRS 1.030 (providing that common law shall be the rule of decision in Nevada courts unless "repugnant to or in conflict with . . . the constitution and laws of this state"). Our review suggests that the two theories under consideration here, while limited in scope, are well grounded in common law. *See, e.g.*, *Halberstam v. Welch*, 227 U.S. App. D.C. 167, 705 F.2d 472 (D.C. Cir. 1983); W. Page Keeton et al., Prosser and Keeton on Torts 322-24 (5th ed. 1984).

> (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
>
> (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

Restatement (Second) of Torts, § 876 (1979) [hereinafter section 876]. *Halberstam v. Welch*, 227 U.S. App. D.C. 167, 705 F.2d 472 (D.C. Cir. 1983), explains that subpart (a) of section 876 corresponds to civil conspiracy, and subpart (b) of section 876 corresponds to civil aiding and abetting. *705 F.2d at 477.* We will review these theories separately.[6]

1. Concert of Action

Under the Restatement, liability attaches for concert of action if two persons commit a tort while acting in concert with one another or pursuant to a common design. Section 876(a). The tort of concert of action has traditionally been quite narrow in the scope of its application. The classic application of concert

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[6] Although the jury was instructed consistently with Restatement section 876(c), the verdict form did not refer to a separate claim under 876(c), but asked whether Dow Chemical was liable for concert of action and/or aiding and abetting. Even though the jury received instruction on section 876(c), we reject liability under that section because, as discussed infra, we conclude that there was no substantial assistance.

of action is drag racing, where one driver is the cause-in-fact of plaintiff's injury and the fellow racer is also held liable for the injury. *Santiago v. Sherwin-Williams Co.*, 794 F. Supp. 29, 31 (D. Mass. 1992), *aff'd, 3 F.3d 546 (1st Cir. 1993)*. Similarly, one court remarked that application of the doctrine of concert of action "is largely confined to isolated acts of adolescents in rural society," *Halberstam*, 705 F.2d at 489, and another court observed that this theory is meant to "deter antisocial or dangerous behavior." *Juhl v. Airington*, 936 S.W.2d 640, 644 (Tex. 1996).

Concert of action resembles the tort of civil conspiracy. *Halberstam*, 705 F.2d at 477. "An actionable [civil] conspiracy consists of a combination of two or more persons who, by some concerted action, intend to accomplish an unlawful objective for the purpose of harming another, and damage results from the act or acts." *Sutherland v. Gross,* 105 Nev. 192, 196, 772 P.2d 1287, 1290 (1989). Civil conspiracy in Nevada differs from concert of action as defined in Section 876 in that civil conspiracy requires that the defendants have an intent to accomplish an unlawful objective for the purpose of harming another, while concert of action merely requires that the defendants commit a tort while acting in concert.

Both causes of action require an agreement. To prevail in a civil conspiracy action, a plaintiff must prove an agreement between the tortfeasors, whether explicit or tacit. *See Eikelberger v. Tolotti,* 96 Nev. 525, 528 n.1, 611 P.2d 1086, 1088 n.1 (1980). Similarly, when section 876 refers to acting in concert with another tortfeasor or pursuant to a common design, it refers to this concept of agreement. See section 876(a), cmt. a; *Halberstam*, 705 F.2d at 477. Proof of

an agreement alone is not sufficient, however, because it is essential that the conduct of each tortfeasor be in itself tortious. Section 876(a), cmts. b. & c.

The Mahlums argue that the evidence shows that Dow Chemical had a "tacit understanding" with Dow Corning to engage in tortious conduct, namely, misrepresenting the safety of the silicone used in breast implants, withholding information regarding the adverse consequences of such silicone from physicians and patients, and providing Dow Corning with a global market for its silicone gel breast implants.

Assuming only for purposes of this discussion that Dow Corning did make fraudulent misrepresentations about silicone breast implants, we conclude that the Mahlums did not prove at trial that Dow Chemical acted in concert with Dow Corning by agreeing to commit fraudulent misrepresentation regarding silicone breast implants. The Mahlums failed to prove the existence of an agreement, tacit or otherwise, between Dow Chemical and Dow Corning in which they agreed to commit fraud regarding silicone breast implants, specifically, to make misrepresentations to physicians and patients about the safety of silicone breast implants. Dow Chemical's few public statements about the potential safety of silicone cannot support an inference that Dow Chemical and Dow Corning had an agreement to misrepresent the safety of silicone breast implants. Accordingly, we conclude that the record lacks substantial evidence of Dow Chemical's liability for concerted action to commit fraudulent misrepresentation, and the judgment must therefore be reversed on this cause of action.

2. Aiding and abetting

Under the Restatement, liability attaches for civil aiding and abetting if the defendant substantially assists or encourages another's conduct in breaching a duty to a third person. Section 876(b). The Mahlums had to prove three elements: (1) that Dow Corning committed fraudulent misrepresentation that injured Mahlum; (2) that Dow Chemical was aware of its role in promoting the fraudulent misrepresentation at the time it provided assistance; and (3) that Dow Chemical knowingly and substantially assisted Dow Corning in committing fraudulent misrepresentation. *See TMJ Implants*, 113 F.3d at 1495; *Halberstam*, 705 F.2d at 477. The second and third elements should be weighed together, that is, greater evidence supporting the second element requires less evidence of the third element, and vice versa. *TMJ Implants*, 113 F.3d at 1495.

The Mahlums contend that certain evidence supports the verdict on their aiding and abetting claim. First, they assert that Dow Corning was aware of potential hazards regarding, or at least harbored doubts about, the safety of silicone gel breast implants, and allegedly made misrepresentations about those implants to Charlotte Mahlum. Second, they assert that the jury could infer that Dow Chemical was aware of Dow Corning's alleged misrepresentations because (a) Dow Chemical representatives held four (of ten) seats -- and later five (of fifteen) seats -- on Dow Corning's Board of Directors; (b) Dow Chemical conducted or supervised some tests on silicone substances for Dow Corning as late as 1970; (c) Dow Chemical's chief toxicologist, Dr. V. K. Rowe, maintained a consulting relationship with Dow Corning from the late fifties until the

early seventies regarding Dow Corning's design, conduct, or interpretation of studies regarding silicone substances; (d) Dow Chemical and Dow Corning agreed to test the silicones later used in breast implants for use as pharmaceuticals and pesticides; and (e) Dow Chemical, through its subsidiary, Lepetit, marketed Dow Corning breast implants outside the United States. Finally, the Mahlums assert that Dow Chemical's research of the pharmaceutical and pesticidal uses of liquid silicone, and its marketing of breast implants through its subsidiary outside the United States, "emboldened" Dow Corning's alleged fraudulent misrepresentations regarding the safety of silicone gel breast implants.

We conclude that the verdict on the aiding and abetting claim cannot stand. The evidence does not establish that Dow Chemical knowingly and substantially assisted Dow Corning in committing a fraud. Even though, as discussed below in section E, the Mahlums established that Dow Chemical negligently performed its undertaking to test liquid silicone, the evidence that the Mahlums advance falls short of proving that Dow Chemical's actions amounted to knowing support or encouragement of Dow Corning's alleged fraudulent conduct. The difference between the failure of proof regarding aiding and abetting and the adequacy of proof regarding negligent undertaking lies in Dow Chemical's failures to act, rather than its deeds. Here, the proof fails to show the necessary actions that would demonstrate Dow Chemical's knowing participation in Dow Corning's alleged fraud. By contrast, the evidence regarding negligent undertaking is present in the tests and cooperation regarding research that Dow Chemical undertook. In other words, the proof regarding Dow Chemical's research activities does not support knowing participation in a fraud. The Mahlums thus failed to show that

Dow Chemical rendered substantial assistance to allegedly fraudulent misstatements that Dow Corning may have made to Charlotte Mahlum.

The Mahlums argue that if Lepetit had refused to market breast implants without warnings, then Dow Corning would not have been emboldened to continue its supposedly false and misleading representations in the United States. The Mahlums' assertion that Lepetit's lack of protest somehow emboldened Dow Corning, thus providing it with substantial assistance, lacks support in the law. To amount to substantial assistance, such encouragement must take the form of a direct communication, or conduct in close proximity, to the tortfeasor. *See Halberstam*, 705 F.2d at 481-82 (suggestive words may be enough to create joint liability when they plant the seeds of action and are spoken by a person in an apparent position of authority). The Mahlums failed to prove the existence of direct communication from Dow Chemical to Dow Corning, or close conduct, that could have promoted a fraud. Accordingly, we reverse that portion of the judgment imposing liability on Dow Chemical for aiding and abetting fraudulent misrepresentations. In light of our reversal of the intentional tort claims, we also vacate the district court's award of punitive damages.[7]

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[7] Accordingly, the Mahlums' cross-appeal with respect to post-judgment interest on punitive damages is moot. *See* NRS 42.005; *Wichinsky v. Mosa*, 109 Nev. 84, 847 P.2d 727 (1993).

E. Negligent Performance of an Undertaking

In contrast to the fraud claims, substantial evidence in the record supports the verdict against Dow Chemical with respect to the claim of negligent performance of an undertaking. We therefore conclude that the judgment with respect to this claim must be affirmed. The trial court's jury instruction was consistent with Restatement (Second) of Torts section 324A, which provides as follows:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to perform his undertaking if
>
> (a) his failure to exercise reasonable care increases the risk of such harm or
> (b) he has undertaken to perform a duty owed by the other to the third person or
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Restatement (Second) of Torts section 324A (1979) [hereinafter section 324A]. This section reflects the "Good Samaritan" doctrine.

The Mahlums contend that Dow Chemical effectively undertook to test completely and adequately the safety of the liquid silicone used in Dow Corning's breast implants and negligently performed that undertaking. Dow Chemical asserts that it did not undertake to test the safety of Dow Corning's silicone gel breast implants or the liquid silicone used therein. Dow Chemical maintains that the tests it performed for Dow Corning over a thirty-year period were unrelated to breast implants and that the other evidence relied on by the Mahlums to establish liability, such as the services rendered by Dr. Rowe, equally failed to demonstrate an undertaking. We disagree.

As an initial matter, Dow Chemical contends that the Mahlums must demonstrate that Dow Chemical undertook a duty with respect to the specific product (Silastic II breast implants) that caused Charlotte Mahlum's harm. Section 324A, however, includes no such requirement. As the federal district court concluded in *In re Silicone Gel Products Liability Litigation*, 887 F. Supp. 1455, 1460 (N.D. Ala. 1995),

> Dow Chemical's reading of [section] 324A is too restrictive. That section provides that one who undertakes services on behalf of another assumes a duty to use due care. The proper focus of the inquiry is whether Dow Chemical undertook to perform services to Dow Corning that Dow Chemical should have recognized were necessary for the protection of third persons. The undertaking creates a duty that would not otherwise exist. Dow Chemical's argument that liability for negligent

> undertaking can arise only as to a specific final product takes too narrow a view of negligent undertaking analysis. Liability can arise when it is reasonably foreseeable that another will be harmed by the failure to exercise reasonable care in performing such an undertaking.

In addition, Dow Chemical argues that the issue of whether it owed a duty to the Mahlums was improperly submitted to the jury by the district court. According to Dow Chemical, the issue of whether a duty existed in this case was a legal question that should have been resolved by the district court. Although "the 'precise nature and extent' of [an alleged section 324A] duty 'is a question of law . . . it depends on the nature and extent of the act undertaken, a question of fact.'" *Artiglio v. Corning Inc.*, 18 Cal. 4th 604, 957 P.2d 1313, 1318 (Cal. 1998) (quoting *Smith v. State*, 921 P.2d 632, 634 (Alaska 1996)); accord *Pratt v. Liberty Mut. Ins. Co.*, 952 F.2d 667, 671 (2d Cir. 1992). At trial, the following evidence pertained to the nature and extent of Dow Chemical's undertaking: (1) Dow Chemical's creation of and fifty percent ownership of Dow Corning, (2) Dow Chemical's control of one-third of Dow Corning's board of directors, (3) Dow Chemical's undisputed expertise in toxicology, (4) Dow Corning's lack of a toxicology laboratory until 1968 and reliance on Dow Chemical's toxicological expertise,[8] (5) the

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[8] A Dow Corning scientist testified that Dow Corning relied on outside consultants, such as Dow Chemical, to interpret toxicology results. Thus, although Dow Chemical argues that it did not perform any tests negligently, the jury could have determined that Dow Chemical was negligent for not fully advising Dow Corning on the meaning of certain test results.

housing of Dow Chemical's and Dow Corning's toxicology laboratories in a Dow Chemical building from 1968 until 1971, (6) the myriad tests performed by Dow Chemical on silicone compounds and the specific tests relating to silicone fluids, (7) the continuing assistance rendered to Dow Corning by Dow Chemical personnel, and (8) Dow Chemical's 1966 joint development agreement, 1969 information development agreement, and 1975 trademark agreement with Dow Corning. Accordingly, we conclude that the type and extent of Dow Chemical's undertaking was properly and necessarily submitted to the jury. In other words, the jury was required to consider the nature and scope of Dow Chemical's undertaking so that its concomitant duty, if any, could be determined. *See Smith*, 921 P.2d at 635.

The record before us reveals substantial evidence from which the jury could determine that Dow Chemical undertook to render services to test the safety of the liquid silicone later used in Dow Corning's breast implants and that Dow Chemical should have recognized those services as necessary for the protection of third persons. Dow Chemical's head toxicologist, Dr. V. K. Rowe, acted as a consultant to Dow Corning on matters concerning silicone toxicology from the late 1940s into the mid 1970s. Documents introduced at trial revealed that Dr. Rowe not only designed the testing protocol for some independent outside laboratories, but also acted as a consultant to Dow Corning's Product Safety Committee in the late 1960s, after Dow Corning introduced its breast implants. Dr. Rowe testified that, in his capacity as an unpaid consultant to Dow Corning, he would render advice on the type of tests Dow Corning should conduct on its silicone substances, interpret the conclusions of such tests, and recommend any additional tests he deemed advisable. Dr.

Rowe also attended, on Dow Corning's behalf, meetings regarding product safety with personnel from outside laboratories that contracted with Dow Corning. In 1967, Dr. Rowe was one of the toxicology consultants who advised Dow Corning's Product Safety Committee on breast implant studies performed on dogs. The evidence also suggested that Dr. Rowe indirectly played a role in setting up part of the test protocol for the 1967 dog study.

The evidence also revealed that Dow Chemical and Dow Corning exchanged important personnel between themselves as well as with Lepetit. For example, in 1968, Kenneth Olson transferred from Dow Chemical's toxicology department to Dow Corning to head its new toxicology laboratory. Olson then returned to Dow Chemical in 1973 with the likely knowledge that silicone fluid was used in Dow Corning's silicone gel breast implants. From 1964 to 1966, Charles Hinman, a scientist from the Pitman-Moore division of Dow Chemical, worked for Lepetit as its scientific advisor. While ostensibly a Lepetit employee, Hinman remained on Dow Chemical's payroll. Lastly, R. William Caldwell, a Dow Corning employee, transferred in 1967 to Dow Chemical as its assistant general manager of bioproducts department. Shortly thereafter in 1968, Dow Chemical sent Caldwell to Lepetit, gave him the title of "administratore delegato," and authorized him to buy, sell, and trade Lepetit without prior approval of Lepetit's board. Caldwell testified that he viewed himself a Dow Chemical employee, despite the changes he underwent in employment.

Additionally, various documents chronicle Dow Chemical's testing of Dow Corning's silicone materials from

the late 1940s into the mid-1970s.[9] Based on the Chenoweth study, Dow Chemical knew as early as 1956 that the silicone fluid DC 200 (the chemical equivalent of DC 360 fluid used in Dow Corning's breast implants), when injected intramuscularly into rats, migrated throughout the body into major organs, including the brain. The Chenoweth study also specifically recognized that silicone fluids were being studied for medicinal purposes and sought to explore their biological activities. In 1957, Dow Chemical's Dr. Rowe knew that the Miami study involving DC 200 fluid showed that the fluid lowered the granulocytic (immune) elements of the female test subjects' blood. During the 1950s and 1960s, Dow Chemical knew that Dow Corning was marketing medical products containing silicones: catheters, brain shunts, heart valves, and drainage valves.[10] Also, in its annual report to stockholders in

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[9] Dow Chemical correctly points out that most of the toxicological tests it performed for Dow Corning fell under the heading of industrial handling tests. The evidence, however, also showed that Dow Chemical freely offered Dow Corning advice on the safety of the products containing the tested materials. For example, Dow Chemical counseled Dow Corning to include a safety warning on a hair conditioner and to conduct further tests on a silicone material used in foot ointment before marketing it. Further, even though the majority of Dow Chemical's tests related to industrial handling, it is undisputed that Dow Chemical was involved with testing liquid silicones for purposes other than industrial handling. That Dow Corning relied on Dow Chemical's toxicological expertise was testified to at trial by former Dow Corning employees, who believed, in the 1950s and the 1960s, that Dow Chemical scientists were the "experts" on silicone toxicology.

[10] This information is partially contained in Dow Chemical's 1959 annual report to its stockholders. A Dow Chemical physician also

1959, Dow Chemical noted that "because of their chemical inertness and lack of toxicity, silicones are rapidly finding use in medical research." Thus, Dow Chemical was aware that many of the silicone substances being tested were destined for use in medical devices, including implants.

In 1970, after Dow Chemical began marketing Dow Corning breast implants outside of the United States through its subsidiary Lepetit, Dow Chemical's pathologist Gary Sparschu found that experiments performed on rats injected with DC 360 fluid showed that the fluid had migrated to different parts of the body, including the bone marrow. The female test animals also showed decreased brain weights. Because Dow Chemical knew prior to the 1970s that other silicone materials developed for medical purposes were being used as implants, knew that liquid silicone was being developed for medicinal uses, and knew at the time of Sparschu's tests that Dow Corning was using liquid silicone in its breast implants,[11] the jury could reasonably infer that Dow Chemical should have known that the services it rendered (e.g., its professional advice and protocol design by Dr. Rowe), the exchange of key personnel to and from Dow Corning, and its toxicological testing of Dow Corning's liquid silicone, were a necessary step in the protection of third

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wrote several articles in the early 1960s on various silicone catheters and tubes made by Dow Corning.

[11] The jury heard evidence from Dr. Rowe that he was aware Dow Corning was using liquid silicone in its breast implants; this information can also be inferred from his involvement in the 1967 miniature implants study in dogs.

persons who would purchase liquid silicone in the form of breast implants. As Justice Mosk of the California Supreme Court explained in *Artiglio*,

> that Dow Chemical acted without a focus on silicone breast implants does not negate the fact that it acted with a focus on silicone implants. Further, that it acted without awareness of plaintiffs as recipients of silicone breast implants does not negate the fact that it acted with awareness of the general class of persons to which plaintiffs belong, that is, recipients of silicone implants.

Artiglio, 957 P.2d at 1323 (Mosk, J., dissenting). Put another way, "if Dow Chemical knew that its testing was being relied upon to develop products that would be implanted in humans, Dow Chemical had a duty to use due care in providing reasonably accurate and complete information even if it did not specifically know in which part of the body the products would be implanted." *In re Silicone Gel*, 887 F. Supp. at 1461.

Further, based on the evidence before it, the jury could have reasonably determined that Dow Chemical's undertaking went beyond the mere occasional testing of organosilicon compounds for Dow Corning. When Dow Chemical and Corning Incorporated created Dow Corning, they contributed technology and licenses that they held with respect to organosilicon materials. The evidence established that from its inception until the late 1960s, Dow Corning lacked a toxicology laboratory and relied, to a considerable extent, on Dow Chemical to perform necessary testing on the

safety of its silicone substances and products. Dr. Rowe testified that in the 1950s, Dow Chemical's toxicology laboratory had a well-respected ranking in the world. Dow Chemical knew that Dow Corning owed a duty to its customers to manufacture and market reasonably safe products. Dow Chemical also knew that Dow Corning lacked a toxicology laboratory until years after Dow Corning began to market breast implants. Additionally, Dow Chemical was aware that Dow Corning heavily relied on the expertise of Dow Chemical's toxicologists, not only to conduct tests on the toxicology of silicone materials from Dow Corning, but also to interpret the test results and to design the testing protocol for outside laboratories with whom Dow Corning contracted.[12]

Moreover, Dow Chemical entered into several noteworthy agreements with Dow Corning, which further support the conclusion that Dow Chemical undertook to evaluate and test the safety of Dow Corning's liquid silicone. The first was a 1966 joint development agreement "relating to the physiological effects from ingestion or injection into the systems of animals or men of particular physiologically active silicones." By this agreement, Dow Chemical and Dow

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[12] Dr. Rowe's testimony and other evidence in the record confirmed that he rendered these services for Dow Corning from the 1940s into the 1970s. Dr. Rowe designed the testing protocol for the 1957 Miami study conducted by Professor Deichmann. He also was consulted on the 1967 dog implant study conducted by an independent laboratory. On the topic of reliance, evidence in the record showed that even in the 1980s, Dow Corning was relying on the 1948 article written by Dr. Rowe for the proposition that silicones were generally inert.

Corning agreed to "jointly share the costs and . . . the profits and losses of any commercialization." The second was a 1969 agreement between Dow Chemical, Dow Corning, and Lepetit pursuant to which the three companies agreed to develop "a body of technical information concerning the biological activity of certain organosilicon compounds."[13] The agreement further noted that "it will be necessary for Dow [Chemical], [Dow Corning], and Lepetit to disclose to one another information in [this area] which is considered to be proprietary and confidential." Neither agreement specifically mentions liquid silicone; nevertheless, as liquid silicone appears to fall within the class of physiologically active silicones and Dow Chemical did amass technical information on liquid silicone compounds, the jury could have reasonably inferred that such compounds fell within the scope of the agreements.

Finally, in 1975, Dow Chemical entered into a trademark and trade name licensing agreement with Dow Corning. Pursuant to this agreement, Dow Chemical agreed to allow Dow Corning to continue using, among other things, the trademark "Dow." This agreement stated that "Dow Company and Corning Company formed [Dow Corning] in 1943 and since then have continuously owned or controlled equally all of the issued share capital of [Dow Corning], and have controlled its operations, including the quality of its goods and services." This language is consistent with licensing requirements under the Lanham Trademark Act of

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[13] Although William Caldwell, a Dow Chemical and Lepetit employee at various times, testified that this agreement pertained to pharmaceutical research, the jury could conclude that this agreement was broad enough to encompass liquid silicone.

1946, 15 U.S.C. § 1051, to protect the mark's integrity. If a licensor fails to exercise control over the licensed mark, it may forfeit the mark as abandoned. *See* generally J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, § 17:6, at 17-6 (4th ed. 1998). Additionally, courts have concluded that although a trademark licensor has a duty to inspect and maintain the quality of goods sold under a trademark license, this duty cannot result in tort liability. *See, e.g., TMJ Implants*, 113 F.3d at 1494; *Mini Maid Servs. Co. v. Maid Brigade Sys., Inc.*, 967 F.2d 1516, 1520 (11th Cir. 1992). Nevertheless, even though this language in the trademark agreement, by itself, is not sufficient to create tort liability on Dow Chemical's part, we agree with the federal district court that the agreement's "existence is one factor in assessing Dow Chemical's knowledge and involvement in Dow Corning's breast implant activities." *In re Silicone Gel,* 887 F. Supp. at 1461.

Based upon the aforementioned evidence, the jury could have found that Dow Chemical undertook to render testing, advisory, laboratory and personnel services for the purpose of promoting the safety of Dow Corning's silicone fluid in order to benefit third persons and had significant control over the development of this fluid.

Because the jury could reasonably conclude that Dow Chemical undertook to completely test the safety of the liquid later used in Dow Corning's silicone breast implants, Dow Chemical had a duty to exercise reasonable care in the performance of this undertaking. *See* Section 324A. Comment b to section 324A explains that the section "applies to any undertaking to render services to another, where the actor's negligent conduct in the manner of performance of his

undertaking, or his failure to exercise reasonable care to complete it, or to protect the third person when he discontinues it, results in physical harm to the third person." Thus, under section 324A, once Dow Chemical undertook to test and advise Dow Corning on the safety of liquid silicone, it was obligated to fully complete this course of conduct. Alternatively, if Dow Chemical discontinued its undertaking at some point, it was required to protect Dow Corning's consumers.

Based upon the evidence adduced at trial, the jury was free to conclude that Dow Chemical failed to perform its undertaking with reasonable care, resulting in physical harm to Charlotte Mahlum. *See Pratt*, 952 F.2d at 671. The Mahlums assert that Dow Chemical negligently performed its undertaking by failing to either conduct further tests to determine the long-term effects of silicones in the human body or at least advise Dow Corning on the need for such studies. We agree and additionally conclude that Dow Chemical was negligent by failing to intervene in the marketing of Dow Corning's breast implants. Thus, we conclude that the evidence supports the jury's finding of negligence.

Under the circumstances, once Dow Chemical undertook to test the safety of Dow Corning's liquid silicone, it was required to fully complete this testing until a reliable safety determination was made. Charlotte Mahlum's expert witness, Dr. Lappe, testified that Dow Chemical did not use reasonable care in designing and conducting follow up studies to confirm or reject results that suggested dangers. The record suggests that Dow Chemical did very little with respect to follow up, long-term testing. Dr. Lappe testified as follows:

> My opinion is a very clear and forceful one that whatever long term testing they did do was inadequate. The results were misreported. The findings were suggestive of problems rather than safety. And in the aggregate, there was absolutely no basis for assuming long term safety based on the animal testing.

Given its knowledge about silicones in general and silicone gels in particular through its testing and advising on silicone fluids research over a thirty-year period, its involvement in and knowledge of breast implants through its controlled subsidiary Lepetit, its parent/subsidiary relationship with Dow Corning, including some control over Dow Corning's products and significant control of testing and protocol, one-third control of Dow Corning's board of directors, fifty percent control of Dow Corning's shares, and the control inferred from its various agreements with Dow Corning, Dow Chemical should have used its influence to halt the marketing of Dow Corning's silicone breast implants until the long-term effect of silicone breast implants on humans was understood and these products were determined to be safe.[14]

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[14] Dow Chemical obtained a majority interest in its Italian subsidiary Lepetit in 1967 and eventually owned more than ninety-nine percent of the company. Through this company, Dow Chemical marketed Dow Corning breast implants outside the United States. As mentioned above, R. William Caldwell, who was Assistant Director of Dow Chemical's Bioproducts Division, testified that he became the "Administore Delegato" of Lepetit. This title gave him the right to buy, sell or trade Lepetit. Additionally, Caldwell testified that even during his tenure at Lepetit, he considered himself a Dow Chemical employee.

Furthermore, Dow Chemical could have acted directly under its 1975 trademark and trade name licensing agreement with Dow Corning. The agreement required that products using Dow Chemical's name be "of a nature and quality that is acceptable to Dow Company and shall not damage or reflect adversely on the reputation or goodwill associated with the name and mark 'Dow'" and that Dow Corning, if requested, submit specimens of its products to Dow Chemical

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Although Dow Chemical's heavy involvement in Lepetit and its breast implant marketing activities does not affect our analysis of the scope of Dow Chemical's undertaking, this evidence does suggest that Dow Chemical had significant knowledge about Dow Corning's breast implants and additional problems associated with them. For instance, in 1971, Lepetit prepared a laboratory report evaluating the pharmacological effects of some silicone components due to reports that some silicone compounds have potential depressant activity on the central nervous system of mammals. This report was copied to Charles Hinman, then assistant director of Dow Chemical's corporate research and development department as well as the director of Dow Chemical's chemical biology research laboratory responsible, in part, for pharmaceutical research. Additionally, the record shows that during 1973 and 1974, Lepetit received numerous reports from physicians complaining about ruptures and other problems of Dow Corning's Silastic breast implants. Given that Lepetit was virtually a wholly-owned subsidiary of Dow Chemical, and the evidence suggesting a high degree of control by an individual who reported directly to Dow Chemical, Lepetit's knowledge of consumer complaints regarding Dow Corning's breast implants can be imputed to its parent corporation. This evidence further supports a finding that Dow Chemical was aware that it needed to act to protect implant recipients.

and permit inspection of its premises to examine the quality of Dow Corning's products. Additionally, pursuant to this agreement, Dow Chemical preserved the right to withdraw its consent to Dow Corning's use of its name.

Aside from any actual control reflected by this agreement, the agreement gave Dow Chemical authority to revoke Dow Corning's license to use the corporate name "Dow" on any questionable products. As Dow Chemical knew of the risks associated with DC 360, and was aware of specific problems that implant recipients had experienced through its subsidiary Lepetit, Dow Chemical should have exercised its power to revoke Dow Corning's trademark and tradename license with respect to breast implants, if Dow Corning had refused to stop marketing these products.

Finally, given that Dow Chemical knew that much of the extensive and specific information it had of DC 200, DC 360, and other liquid silicones' potential danger was not widely disseminated, it could have also published its knowledge of the potentially hazardous biological effects of liquid silicones. Such publication would have put the medical community on notice of the potentially significant dangers that could result from implantation. Unfortunately, Dow Chemical failed to take any of these actions. Instead, it continued to market Dow Corning breast implants outside of the United States and to reap the financial benefits of Dow Corning's domestic sales. The jury could therefore reasonably conclude from these facts that Dow Chemical negligently performed its undertaking with regard to the safety of the liquid silicone subsequently used in breast implants, as it failed to completely test the silicone liquid for safety and failed to protect the third-party implant recipients.

The jury also had sufficient evidence to conclude that Charlotte Mahlum's physical harm resulted from Dow Chemical's failure to exercise reasonable care.[15] *See* section 324A (One who undertakes to render services that should be recognized as necessary for a third person's protection "is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to perform his undertaking."). As discussed above, the Mahlums introduced expert testimony which tended to prove that Dow Corning's breast implants caused Charlotte Mahlum's illnesses.

Obviously, had Dow Chemical acted to prevent Dow Corning from marketing its breast implants, either through direct influence or its trademark agreement, Charlotte Mahlum would not have suffered injuries from these implants.

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[15] Dow Chemical is not immune from liability based on the mere fact that Dow Corning did not introduce its silicone gel breast implants until 1962, several years after the Chenoweth and the Miami studies were done. Neither is Dow Chemical absolved from liability because the injuries to Mahlum occurred in the 1990s, when Dow Chemical had ceased performing any tests for Dow Corning's silicone materials. The consequences of a negligent defendant's act under section 324A may come to fruition many years after its undertaking has ended, and still the courts have found that liability may exist. *See, e.g., Deines v. Vermeer Mfg. Co.*, 752 F. Supp. 989 (D. Kan. 1990), aff'd, 969 F.2d 977 (10th Cir. 1992) (holding that defendant insurance company that no longer insured the manufacturer could be held liable for injuries caused by a hay baler machine built in 1978 based on a 1974 design safety-inspected by defendant).

In addition, testimony at trial included the opinion of Charlotte Mahlum's expert witness, Dr. Lappe, that had Dow Chemical publicized its knowledge of the dangers of liquid silicone to the scientific or medical community, efforts would have been made to stop the use of medical products containing liquid silicones until further tests established the safety of such products. Charlotte Mahlum also testified that had she known of the significant health hazard posed by liquid silicones, she would have refused Dow Corning's breast implants.

It was foreseeable that proceeding with the marketing of silicone breast implants and failing to present any information regarding the potential dangers of silicone fluids would result in women electing to receive the implants without a full appreciation of the risks involved. Based upon the evidence adduced at trial, the jury could have found that Dow Chemical had a significant level of control over Dow Corning and its products. Dow Chemical certainly had the authority to influence Dow Corning and to assert direct pressure on Dow Corning through its trademark agreement. Dow Chemical, however, did nothing.

We previously discussed the nature of duty and potential section 324A liability in *Wright v. Schum*, 105 Nev. 611, 781 P.2d 1142 (1989). Wright recognized that a landlord could be liable, under section 324A, for injuries caused by a dog known to be vicious that escaped from the leased premises through an obviously broken gate. The Wright opinion recognized that "the mere advice or warning by one person to another that care should be taken to avoid a certain risk does not in itself create an undertaking and consequent

liability on the part of one giving such advice."[16] *Id.* at 616, 781 P.2d at 1145. We also emphasized in Wright that the landlord was not liable simply because he was the landlord; instead, the landlord had intended to and did influence the conduct of his tenants by threatening to evict them unless they kept the dog in the house or on a chain. *Id.* at 616-17, 781 P.2d at 1145. Nevertheless, this court noted that the landlord's status as a landlord created the general liability under section 324A. *Id.* at 616 n.2, 781 P.2d at 1145 n.2. Specifically, since the landlord had the power to enforce his demand that the tenant take care of the dog, and used this power, he undertook a duty to exercise due care and could be found liable for his breach of this duty. *Id.* at 617, 781 P.2d at 1145-46.

Here, as in Wright, Dow Chemical's duty and resulting liability is not based solely on its status as a parent corporation. By virtue of its status as a creator parent, however, Dow Chemical had a degree of power over Dow Corning. As has been previously mentioned, Dow Chemical maintained fifty percent ownership of Dow Corning's stock and one-third control of Dow Corning's board of directors. Dow Chemical also tested and advised Dow Corning on its

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[16] The justices dissenting to this opinion's conclusion on negligent undertaking posit that this language from Wright cuts against any emphasis we place on Dr. Rowe's status as a consultant. By making this assertion, they misconstrue our analysis and conclusion. Wright explains that mere advice, in and of itself, cannot create section 324A liability. We do not even remotely propose that Dr. Rowe's actions, considered alone, would implicate section 324A. Dr. Rowe's role as a consultant is one of many factors that the jury assessed in determining the scope of Dow Chemical's undertaking.

silicone products for several decades. During most of this time, Dow Corning lacked its own toxicology lab, and Dow Corning's Bioscience Research Department was located within the same building as Dow Chemical's toxicology and research laboratories from 1965 until 1970. Dow Chemical designed testing protocol and exercised influence in the area of toxicology, and, over the years, Dow Chemical freely transferred its employees to and from Dow Corning. Further, Dow Chemical entered into a 1966 joint development agreement, a 1969 information development agreement, and a 1975 trademark agreement with Dow Corning. These agreements could support a finding by the jury that Dow Chemical was exercising actual control over the development of information and silicone products. The record is also replete with examples of Dow Corning following Dow Chemical's lead; in fact, our review of the record discloses no instance when Dow Corning failed to act in accordance with Dow Chemical's instruction. Consequently, we conclude that substantial evidence of Dow Chemical's control over Dow Corning, as required by Wright, was presented to the jury.[17]

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[17] As stated above, we do not suggest that negligent undertaking liability could be imposed on Dow Chemical merely because of its parental relationship with Dow Corning. We also do not imply that liability for negligent undertaking could be imposed on Dow Chemical merely because, at various times, it tested precursor components and the main component of the gel in Dow Corning's Silastic breast implants. A consultant performing tests on components for a customer has a duty only to reasonably fulfill such duties as contemplated by the parties under their agreement. Here, however, we must emphasize that Dow Chemical's involvement with and control over Dow Corning and its development of breast implants far exceeded that of a mere

As a last requirement under section 324A, the Mahlums needed to show one of three things: (a) that Dow Chemical's negligence increased the harm to them, (b) that Dow Chemical undertook a duty owed by Dow Corning to them, or (c) that either Dow Corning or they relied on Dow

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consultant. We disagree with our colleagues' characterization of this opinion as working mischief and having "far reaching implications" on Nevada jurisprudence. Our analysis of section 324A does not create an "everlasting duty" and "infinite liability" for consultants who perform limited testing or merely provide expertise and advice. As we have explained, the Mahlums' proffer of evidence indicated and suggested that Dow Chemical had significant control of Dow Corning. This evidence of control has led us to conclude that Dow Chemical's undertaking, and correlative duty, transcended that which would normally be attributed to an independent consultant.

Additionally, we wish to point out that Dow Chemical's duty as a "good samaritan" is not unlimited. We are well aware of the troubling issues regarding the scope of Dow Chemical's duty. *See, e.g., Matter of New York State Silicone Breast Implant Litig.*, 166 Misc. 2d 299, 632 N.Y.S.2d 953, 956-57 (Sup. Ct. 1995) (noting that if it were to hold that Dow Chemical assumed a duty of care to all potential consumers of silicone products, "the duty imposed on Dow Chemical would be indeterminate and infinite"), aff'd, 227 A.D.2d 310, 642 N.Y.S.2d 681, appeal dismissed, 89 N.Y.2d 889, 676 N.E.2d 493, 653 N.Y.S.2d 911 (N.Y. 1996). We need not view the scope of Dow Chemical's duty as reaching all potential consumers of silicone products. We conclude only that Dow Chemical undertook to completely and accurately test the safety of the silicone liquid that was subsequently used in breast implants. In light of this undertaking, Dow Chemical owed a duty of care to breast implant recipients.

Chemical's undertaking.[18] We conclude that, based upon the evidence discussed above, the jury could conclude that Dow Chemical undertook at least part of the duty, owed to the Mahlums by Dow Corning, to reasonably ensure the safety of breast implants. Additionally, substantial evidence supports a determination that Dow Corning relied on Dow Chemical to inform it not only of the significance of findings such as silicone migration, but also to inform it of what additional tests or studies were required based upon such findings. Because Dow Corning lacked a toxicology department until 1968, six years after Dow Corning began to sell breast implants, the jury reasonably could have found that Dow

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[18] Dow Chemical asserts that in order for reliance to be proven, Dow Corning needed to forego all other remedies related to the safety of liquid silicones, such as testing by other laboratories on liquid silicones or the breast implant product itself. Dow Chemical's approach is too restrictive. In *Canipe v. National Loss Control Service Corp.*, 736 F.2d 1055 (5th Cir. 1984), an injured machine operator brought an action for personal injuries against a corporation which had contracted with the injured operator's employer to provide safety inspections and other accident-prevention services in the injured operator's workplace. In addressing a similar argument by the defendant corporation that a prerequisite of liability was that the employer had foregone any other safety precautions other than those provided by the defendant, the Fifth Circuit Court of Appeals rejected the defendant's argument and held that "an employer's partial reliance on the defendant's undertaking will suffice to trigger subsection (c) [of Restatement section 324A]." *Id.* at 1063. In short, the Mahlums need not have shown that Dow Corning completely abandoned all other safety tests or inspections in reliance on Dow Chemical's undertaking.

Chemical undertook part of Dow Corning's duty to its customers, and that Dow Corning relied on Dow Chemical's tests and expertise in developing its silicone breast implants. Thus, we conclude that liability under subsections (b) and (c) of section 324A is supported by substantial evidence in the record.

In sum, the record includes substantial evidence on which a reasonable jury could find that Dow Chemical was liable under section 324A for negligently undertaking its duty to completely test the safety of liquid silicone later used in breast implants and/or to warn recipients of the risks involved with these implants. Consequently, the judgment is affirmed on this cause of action.

F. New Trial Issues

Dow Chemical also appeals from a number of rulings that purportedly require us to remand this case to the district court for a new trial. A new trial may be granted for: (1) irregularity in the proceedings of the court, jury, master, or adverse party, or any order of the court, or master, or abuse of discretion by which either party was prevented from having a fair trial; (2) misconduct of the jury or prevailing party; (3) accident or surprise which ordinary prudence could not have guarded against; (4) newly discovered evidence material for the party making the motion which he could not, with reasonable diligence, have discovered and produced at the trial; (5) manifest disregard by the jury of the instructions of the court; (6) excessive damages appearing to have been given under the influence of passion or prejudice; or, (7) error in law occurring at the trial and objected to by the party making the motion. NRCP 59(a). The standard of review for granting

or denying a motion for a new trial is abuse of discretion. See *Hazelwood v. Harrah's*, 109 Nev. 1005, 1010, 862 P.2d 1189, 1192 (1993).

Dow Chemical cites numerous issues for which it argues it deserves a new trial: (1) whether the district court erred in allowing Dr. Lappe to testify concerning Dow Chemical's legal duties; (2) whether the district court erred in admitting evidence concerning silicones that are not contained in breast implants and in excluding evidence of the safe uses of silicones; (3) whether admission of a memorandum concerning the fatal effect of silicone on cockroaches constituted reversible error; (4) whether the district court erred in admitting the joint defense agreement between Dow Chemical and Dow Corning; (5) whether the district court erred in admitting evidence of a 1984 jury verdict against Dow Corning; (6) whether the district court erred in admitting internal Dow Corning documents that Dow Chemical had never seen; (7) whether evidence regarding Dow Chemical's subsidiary, Lepetit, should have been excluded; (8) whether it was reversible error for the court to exclude evidence concerning Dow Chemical's profits or lack thereof from the sale of breast implants; (9) whether the district court erred in striking Dow Chemical's deposition designations; (10) whether the Mahlums' trial counsel engaged in misconduct; (11) whether the district court improperly deprived Dow Chemical of its right to the counsel of its choice; and (12) whether the district court erred in instructing the jury. Dow Chemical also contends that the compensatory damages were excessive. Five issues are more troubling than the others and merit discussion below. The balance of the issues not discussed here are rejected as moot or lacking merit.

Dow Chemical maintains that the district court erred by introducing into evidence a 1984 jury verdict of fraud against Dow Corning in a breast implant case (the Stern verdict). The Mahlums argue that this evidence was relevant for notice because in 1984, one year before Mahlum received her breast implants, Dow Chemical, through its representation on the Dow Corning Board of Directors, received notice of the harmful effects of silicone breast implants and did nothing. Although Dow Chemical argues that the Mahlums' notice theory is inconsistent with its fraudulent concealment claim (because fraud is an intentional act), we conclude that mere inconsistency should not render mention of the Stern verdict inadmissible. Mention of the Stern verdict was fairly brief, and was offered to prove notice rather than to convince the jury that it should render a similar verdict. Admitting a prior verdict as evidence, however, is a practice that we condemn as generally highly prejudicial. A district judge who admits such evidence risks reversal under NRS 48.035. But in this particular instance, we are not convinced that unfair prejudice outweighed the probative value of a few brief references to the Stern verdict at this trial. We therefore conclude that mention of the Stern verdict is not a sufficient basis for remanding this case for a new trial.

In addition, Dow Chemical sought unsuccessfully to introduce evidence of the safe uses of polydimethylsiloxane silicones used in such devices as hydrocephalic brain shunts and heart valves. Dow Chemical maintains that the jury was thus prevented from hearing deposition evidence concerning the safe and beneficial uses of silicone in medical applications. The district court excluded Dow Chemical's deposition designations as untimely under the court's pretrial orders. At trial, the district court permitted Dow Chemical the

opportunity to admit some of the previously excluded evidence where Dow Chemical could show that such evidence was critical to its defense. We conclude that the district court acted within its discretion in excluding the designations as untimely. *See* NRCP 16(b); NRCP 37(b)(2)(B); *Kelly Broadcasting v. Sovereign Broadcast*, 96 Nev. 188, 192, 606 P.2d 1089, 1092 (1980).

Further, Dow Chemical attempted to exclude evidence of tests purporting to show the toxicity of silicone compounds other than those used in Dow Corning's breast implants. The district court admitted this evidence on the ground that it was relevant to the Mahlums' aiding and abetting and conspiracy claims. According to the Mahlums, this evidence is relevant because the two companies' cooperation in testing silicone compounds shows the close relationship between them. The decision to admit or exclude relevant evidence, after balancing the prejudicial effect against the probative value, is within the sound discretion of the trial judge, and the trial court's determination will not be overturned absent manifest error or abuse of discretion. *See NRS 48.035*; *K-Mart Corporation v. Washington*, 109 Nev. 1180, 1186, 866 P.2d 274, 278 (1993). Evidence of such silicone compounds was material to the elements of the claims of accessory liability. Admission of the evidence regarding silicone compounds was therefore properly within the discretion of the district court.

Dow Chemical also assigns as error the district court's decision to admit a joint defense agreement between Dow Corning and Dow Chemical. Dow Chemical sought a motion in limine to exclude any reference to a 1992 joint defense agreement between Dow Corning and Dow Chemical concerning any silicone breast implant litigation. One of Dow

Chemical's attorneys, during the cross-examination of the Mahlums' witnesses, stated that it was a Dow Corning attorney who had conducted the witness' deposition. Because this remark by Dow Chemical "opened the door," the district court admitted the joint defense agreement into evidence. Dow Chemical argues that the jury could easily misconstrue the significance of the joint defense agreement and conclude that it was jointly responsible for any breast implant injuries. Dow Chemical also contends that the district court erred in not offering a limiting instruction that would have informed the jurors that they were not to draw any negative inferences from the joint defense agreement. We conclude that the district court erred in admitting the joint defense agreement based on a passing reference to Dow Corning's participation in the earlier stages of this case. Although the admission of the joint defense agreement was unjustified, we conclude that its admission was harmless error, *see* NRCP 61, and not a sufficient basis for remanding this case for a new trial, because it was apparent at trial that Dow Corning had participated in earlier stages of the litigation and that Dow Corning's and Dow Chemical's interests were related.

Dow Chemical contends that the district court erred in refusing to allow two Dow Corning attorneys, who were not members of the Nevada bar, to represent Dow Chemical at trial pro hac vice. The district court refused to permit them to represent Dow Chemical because their proposed representation of Dow Chemical would conflict with their duties to Dow Corning. A district court has inherent power to enjoin an attorney from representing conflicting interests. *Boyd v. Second Judicial District Court*, 51 Nev. 264, 268, 274 P. 7, 8 (1929). When a district court must decide whether an attorney's conflicts of interest should preclude

representation, any doubt should be resolved in favor of disqualification. *See Cronin v. District Court*, 105 Nev. 635, 640, 781 P.2d 1150, 1153 (1989).

Dow Chemical had filed a cross-claim against Dow Corning; hence, the interests of the two companies were plainly adverse. Shortly before trial, citing the conflict of interest with Dow Corning, the district court denied Dow Chemical's request to designate two attorneys, Nancy Lawson and John Donley, who had formerly represented Dow Corning in breast implant litigation. Dow Chemical failed to inform the court in timely fashion that Dow Corning had granted permission to permit Ms. Lawson to represent Dow Chemical, in a letter dated May 24, 1995.[19] (It appears that Dow Corning did not specifically consent to have Mr. Donley represent Dow Chemical at trial.) Dow Chemical apparently did not submit the letter waiving the conflict to the court until September 29, 1995, the same day that the court ruled that Nancy Lawson could not serve as Dow Chemical's counsel because of the conflict of interest.

Dow Chemical maintains the district court abused its discretion in denying Dow Chemical its counsel of choice. According to Dow Chemical, it was severely prejudiced at trial by relying on counsel that were substantially less well prepared for certain critical tasks than its attorneys of record. The Mahlums argue that both attorneys had conflicts of

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[19] Dow Chemical had submitted affidavits from the attorneys stating that Dow Corning had given its permission, but had not submitted evidence of direct permission from Dow Corning. The district court properly insisted on a letter from Dow Corning before it would consider permitting the representation.

interest and that neither of them produced timely proper evidence of Dow Corning's consent to dual representation.

While Dow Chemical had a letter from Dow Corning waiving any conflict that might arise from Ms. Lawson's representation of Dow Chemical at trial, Dow Chemical did not present that waiver to the court in a timely fashion, and apparently presented no waiver regarding Mr. Donley. Under these circumstances, the district court did not abuse its discretion in refusing to permit the Dow Corning attorneys to represent Dow Chemical at trial.

IV. Conclusion

In conclusion, we reverse the district court's judgment on the claims of fraudulent concealment, concert of action, and aiding and abetting. Consequently, we also vacate the award of punitive damages. We affirm the judgment on the claim of negligent undertaking, and we affirm the district court's order denying Dow Chemical's motion for a new trial.

Rose, J.

CONCUR

AMES; SPRINGER (In part); MAUPIN (In part)

AMES, D.J., concurring:

I concur in the opinion's analysis and result except that I do not believe the trademark agreement has much, if any,

probative value in determining Dow Chemical's negligent undertaking liability.

Ames, D.J.[1]

DISSENT

SPRINGER (In part); MAUPIN (In part)

SPRINGER, C.J., concurring in part and dissenting in part:

I concur in the court's opinion affirming the trial court's judgment on the negligent undertaking claim; but I dissent to the court's reversal of the punitive damage awards.[1]

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[1] The Governor appointed the Honorable Jack Ames, District Judge, to sit in the place of the Honorable Cliff Young, Justice, who voluntarily recused himself from participation in the decision of this appeal. Nev. Const. art. 6, 5 4.

[1] I join the majority in affirming the negligent undertaking judgment; still, Dow Chemical has presented some very persuasive arguments on the question of causation. The plaintiffs have, of course, the burden of proving that the chemical compounds which make up the implant were a substantial factor contributing to the harm suffered by Mrs. Mahlum. I have no trouble with the causation issue as it relates to the severe local reaction caused by the implants. I am aware, however, that proof of causation as to autoimmune and systemic disease is problematical, principally because these disorders frequently occur in the absence of implants and because a very large body of investigators does not accept the correlation between implants and systemic disease. Although recognized connective tissue disorders are regularly encountered by breast implant recipients, it would appear that there is a paucity of epidemiological evidence to indicate that women with implants are

Unlike my colleagues, I see this case as a case in which there is sufficient proof of implied malice for the jury to award punitive damages.

Punitive damages may be awarded where a defendant is guilty of malice. *See* NRS 42.005(1). Malice may be express or implied. *Id.* Express malice is present when a defendant "intended to injure a person." NRS 42.001(3); *see also Clark v. Lubritz,* 113 Nev. 1089, 1099, 944 P.2d 861, 867 (1997). Implied malice is present where a defendant is guilty of "despicable conduct which is engaged in with a conscious disregard of the rights or safety of others." NRS 42.001(3); *Lubritz*, 113 Nev. at 1099, 944 P.2d at 867. The jury rendered a special verdict that Dow Chemical had acted "with conscious disregard of the safety of others." I see no reason for interfering with the jury's special verdict and would, on the basis of that verdict, affirm the punitive damage judgment.

NRS 42.001 (1) defines conscious disregard as having "knowledge of the probable harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid those consequences." The special verdict finding that Dow Chemical was guilty of consciously disregarding the

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more likely to develop these disorders than women without implants. In my view, under the circumstances of this case, Mrs. Mahlum should not have to wait for a "general acceptance" or other indicia of biomedical consensus that implants cause systemic harm as a condition to her proceeding with her claim against Dow Chemical. In agreeing with the majority, I take the position that there is nothing in this record that prevents us from accepting case-specific causal analysis upon which the Mahlum claim is based.

safety of Mrs. Mahlum, and others like her, in my view, is all that is necessary to support the punitive damage award in this case. In addition to finding the requisite conscious disregard, the jury filled out its special verdict with findings that Dow Chemical was actually aware of the danger posed by the breast implant (the danger, I would propose, that was created when Dow Chemical "worked together in a joint development program" with Dow Corning, under the agreement in which Dow Chemical and Dow Corning "developed . . . a body of technical information concerning the biological activity of certain organosilicon compounds.")[2] In addition to finding that Dow Chemical was "aware of the probable dangerous consequences of its conduct," the jury also specifically concluded that Dow Chemical "willfully and deliberately failed to avoid" the dangerous consequences of silicone breast implantation. Put another way, the jury believed that Dow Chemical and Dow Corning, joint developers of the breast implant marketed by Dow Corning, were aware of what they were doing and acted in conscious disregard of the

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[2] Subsequent to the Dow Chemical and Dow Corning "joint development program," came an additional agreement on August 14, 1969, in which Dow Corning and Dow Chemical with Dow Chemical's subsidiary, LePetit SpA, the international distributor of the breast implant, agreed to carry out further work in the area of "biological activity" of silicones. The August 14 "obligation of confidence and nonuse" undertaken by the three companies required "technical information" concerning biological activity of silicones to be held in confidence; and each company agreed that it would not use the biological information developed in their joint development program for "commercial purposes" other than as joint developers of the biological products contemplated by the agreement.

"dangerous consequences" inherent in placing silicone in the human body in the Dow Corning Silastic II.

In its brief, Dow Chemical's first response to the damning consequences of the special verdict is that there is "no evidence that Dow Chemical knew that breast implants were likely to be dangerous." (Emphasis in Dow Chemical's brief.) Dow Chemical's second argument is that there is not "any basis for the plaintiff's claim that it willfully and deliberately breached a duty to stop Dow Corning from selling breast implants."

With regard to the first argument, it appears to me that there is quite a bit of evidence from which the jury could have concluded that Dow Chemical "knew" that breast implants were likely to be dangerous. The overriding answer to Dow Chemical's contention is that by virtue of such Dow Chemical-Dow Corning arrangements as their "joint development program," their "joint research agreement," their mutual "obligation of confidence and nonuse" (relating to the biological activity of silicones) and, especially, the joint testing of miniature breast implants in dogs, whatever Dow Corning knew about the dangers of biological uses of silicone, Dow Chemical probably knew of the dangers, as did Dow Corning. It is plain that the two Dow companies had been working together for years on the use of silicones for medical purposes and that in later years they worked together on the development of breast implants.

I give special significance to Dow Chemical's declaration of its control over Dow Corning in its agreement with Dow Corning, dated May 5, 1975. In this written document, Dow Chemical and Dow Corning concur in the

understanding that from the time Dow Corning was formed in 1943, Dow Chemical and Corning Corporation had "controlled equally" the share capital of what Dow Chemical calls its "Associate Company" namely, Dow Corning, and that, since that time, Dow Chemical and Corning Corporation have "controlled its [Dow Corning's] operations, including the quality of its goods and services." (Emphasis added.) Although Dow Chemical may argue in its brief "that there was no evidence that Dow Chemical knew that Dow Corning was misrepresenting the safety of its products," it seems to me that if Dow Chemical had been controlling Dow Corning's operations, as it says it was, and was controlling the quality of its goods and services, it is hard for Dow Chemical to argue that it did not know that Dow Corning was misrepresenting the safety of the Silastic II.

There is other evidence (other than Dow Chemical's declaration that it had control over the operation of Dow Corning and the quality of its products) that Dow Chemical knew that silicone breast implants were potentially dangerous and that Dow Corning was "misrepresenting the safety" of this product.[3] Actually, given the state of this record, it is a very difficult task for Dow Chemical to deny that it did not

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[3] Dow Chemical stated that it "controlled" (past tense) Dow Corning's operations and the quality of its goods. Now it claims that the statement was untrue and that it was merely meaningless "boilerplate" that was necessary to preserve its right to "use of the 'Dow' mark." Dow Chemical argues that there was "no evidence" that Dow Chemical "actually controlled the quality" of Dow Corning products. Whether Dow Chemical actually controlled Dow Corning or was deceiving the Patent and Trademark Office is a matter for the jury to decide.

know about the dangerous potential inherent in placing the Silastic II silicone gel into the human body. Dr. Marc Alan Lappe, toxicologist, medical ethician and expert in the field of silicone chemistry, testified that Dow Chemical possessed the "key findings of adverse effects of the components of Dow Corning's silicone based breast implants." Dr. Lappe pointed out that although Dow Chemical had knowledge about such things as the migration of silicone throughout the body and silicone's ability to "bleed" out of its elastomer shell, Dow Chemical "did not report the studies that would demonstrate what the toxicologic properties were of the known components of silicone gel." Dr. Lappe went so far as to testify that if Dow Chemical had disclosed the details of the Dow Chemical "research program into . . . how polydimethylsiloxanes used in implants had effects on the immune and central nervous system, . . . the implants would have been taken off the market long before 1992."

As further evidence of Dow Chemical's knowledge and its joint role in a number of experiments relating to the principal component of breast implants, the DC 360 silicone fluid, Dow Chemical admits, as put in its opening brief, that "Dow Chemical tested or participated in tests involving DC 360 fluid, which was later used . . . to make the gel in Silastic II implants." Dow Chemical also admits in its brief that it "conducted or participated in approximately ten tests on DC 200 fluid, which is an industrial silicone fluid that is chemically similar to the DC 360 fluid" that was used in Mrs. Mahlum's implants. Dow Chemical appears to be arguing that even though it tested the silicone fluids that were later used in the implants, it did not do so for the specific "purpose of determining whether it was safe for use in a medical implant." It is hard for Dow Chemical to maintain such a position given

its admission that it "tested or participated in tests involving DC 360 fluid." Dr. Lappe testified that DC 360 was used as the major component in the 1970 "miniature breast implants" test in dogs and that the implant experimenters were "following an outline that had been laid out by Dow Chemical and sent to FDRL, to Dr. Carson." (See page 8.) The record belies Dow Chemical's assertion that it did not test components of Silastic II (namely, DC 360 and similar organosilicon compounds) for the purpose of determining the safety of these components for use as medical implants. As I see it, whatever responsibility that Dow Corning might have for employing DC 360 in medical implants must be shared with Dow Chemical, there is evidence to support a jury finding that Dow Chemical should share that responsibility, perhaps equally, with Dow Corning.

From the tests that Dow Chemical "conducted or participated in," Dow Chemical was likely to have known, at the very least, that the mentioned silicone liquids, when introduced into the bodies of mammals, migrated throughout the bodies of the test animals. (*See, e.g.*, 1956 study by Dr. M. B. Chenoweth of Dow Chemical's biochemistry department.)

As I have said, Dow Chemical's position seems to be that although it safety-tested the principal component of breast implants, it did not test silicone implants as such. To this contention I say that, even without considering the Dow Chemical-designed experiment with miniature breast implants, the evidence seems to show that Dow Chemical and Dow Corning jointly "participated" in the development and safetytesting of a substance designed to be placed within the human body and that the two companies should share in

responsibility for the adverse consequences associated with placing the substance within the human body.

I see as the gist of the Mahlums' claim against Dow Chemical the two Dow companies' having "participated" and worked together[4] in developing and testing a form of silicone that was intended by both companies to be placed inside the human body. Whether one wants to say that the two companies are jointly liable for carrying out this activity or to say that Dow Chemical "undertook" the task of assisting Dow Corning in doing so, the facts support a conclusion that both Dow Corning and Dow Chemical had a duty to Mrs. Mahlum and other intended users of DC 360 to insure that the substance could be used safely for its intended internal-implantation purpose or, at least, a duty to warn of the dangers which were known to both Dow Chemical and Dow Corning.

In its opening brief, Dow Chemical argues: "Dow Chemical never specifically undertook to render any advice with respect to the safety or suitability of silicones for use in breast implants and therefore cannot be liable for its alleged failure to recommend long-term testing." The record, and

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[4] A particularly poignant indication of the collaborative arrangement between the two Dow companies is the reference in a February 1, 1967, board meeting to a joint research agreement with Dow Chemical Company pertaining to certain silicone products . . . and [a] joint development agreement relating to the physiological effects resulting from ingestion or injection into the systems of animals or men of particular physiologically active silicones, wherein in principle, the parties shall jointly share the costs and shall share the profits and losses of any commercialization.

particularly the testimony of Dr. Lappe, repels this assertion. The miniature breast implant study alone tells us that Dow Chemical not only rendered "advice" in this testing, Dow Chemical people designed and supervised these medical tests, tests that can only be described as breast implant tests.

From at least the time of the Chenoweth Study in 1956, we know from Dr. Lappe that Dow Chemical and Dow Corning were investigating together the biological reactivity of certain kinds of silicones and were working toward the "increasing use of siloxanes for medicinal application." (Emphasis added.) From the time of the Chenoweth Study, both companies were aware that when these silicone compounds were injected into a mammalian body they migrated throughout the body, with injury being done to a number of organic systems. The jury knew, then, that the two companies were involved in more than just "basic research," that they were jointly testing chemicals for a "particular purpose," that purpose most likely being to determine whether DC 360 could be safely used medically within the human body. The issue here, then, is not the Mahlums' seeking to hold Dow Chemical liable for faulty, basic research on silicone products. The Mahlums, on the state of this record, can credibly charge Dow Chemical with actively collaborating with Dow Corning and participating with Dow Corning in the research and development of DC 360, not only for general, internal medical uses, but for the specific use in breast implants, as evidenced by the miniature breast implants which were the subject of the Dow Chemical-Dow Corning, four-dog study. This study was completed in 1970, using miniature silicone gel breast implants. Four dogs were examined after six months and twenty-four months from the time of implantation. One of the dogs died after eleven months, from

causes not related to the experiment. This dog, on autopsy, exhibited evidence of liver and kidney congestion and some fibrous tissue reaction at all of the sites of implantation. With reference to the three surviving dogs, after twenty-four months, almost all of the implantation sites had severe or moderate chronic inflammation. A report of the study, co-authored by Silas Braley of Dow Corning, was published in 1973. According to Dr. Lappe, the report falsely told the "scientific community there were no differences at six months and two years and provided only six month's data." Dr. Lappe testified that the Braley Report does not give the scientific community a chance to perform an independent evaluation of the two-year data and falsely represents that the results were the same at six months and twenty-four months. Further, the report failed to say that one of the dogs had died (stating that all four had survived) and did not report the adverse reactions appearing in the autopsy report of the dog that had died.

According to Dr. Lappe, there was another study done by Dow Chemical Company on DC 360 fluid in 1970. This study contains a pathology report of what happens when DC 360 fluid is injected into rats. Dr. Lappe was asked: "What [did] Dow Chemical find out about silicone and where it goes in bone marrow in 1970, sir?" His answer:

> The test animals developed vacuolizations which were evidence to them of the presence of silicone in the bone marrow. That is where blood products are produced, the cells of blood are produced primarily in the bone marrow. They also found evidence of lung congestion and evidence of involvement of the liver.

The experiment also found a statistical difference in brain weight in the experimental animals. Dr. Lappe considered it to be significant that this was a Dow Chemical Company internal company report and that, according to Dr. Lappe, it was not filed with the FDA or shared with the scientific community. Dr. Lappe also testified that Dow Corning published a report in its own name that "reads word for word identical" to the Dow Chemical report referred to. All reference to Dow Chemical was deleted in the second, identically-worded Dow Corning report.

Dr. Lappe further testified about two 1973 pathology studies conducted by Dow Chemical "on various silicone implant specimens [involving] tissue specimens taken from rabbits that have been either control or were treated with Dow Corning materials." Experimenters, according to Dr. Lappe, "all [found] evidence of chronic inflammatory reaction characterized by what are called multinucleated giant cells in this particular study."

All of Dr. Lappe's testimony is very much in line with a "joint development agreement" made by Dow Chemical and Dow Corning in 1967. This agreement, both a "joint research agreement" and a "joint development agreement," pertained to "DC 555 and compounds derived from and related thereto." The subject of the Dow Chemical-Dow Corning agreement was "the physiological effects resulting from the ingestion or injection into the systems of animals or men of particular physiologically active silicones, wherein in principle, the parties shall jointly share the costs and shall share the profits and losses of any commercialization." Minutes of a Dow Chemical board of directors' meeting referred to an October 1, 1966, agreement between Dow

Corning and Dow Chemical for the "research and commercial development in the field of physiological effects of certain organosilicon compounds," which Dr. Lappe takes to be referring to the determination by these two companies of "whether or not the compounds, like DC 360 or 200 or 555, would have an effect that would perturb or upset or enhance the human body's basic physiological or metabolic life sustaining activities."

Also put into evidence were the March 1977 minutes of the annual meeting of stockholders of Dow Corning. The minutes contain a document entitled "Dow Chemical Company Evaluation of Bioactive Organosilicon Compounds." There can be no denying of Dow Chemical's ongoing interest in silicone research for medical purposes. In 1969, the two Dow companies signed an agreement to work together in a "joint development program" relating to the "biological activity of certain organosilcon compounds," in which the two companies agreed to "maintain such information in confidence" and neither would use the results for its own commercial purposes. All in all, there would seem to be an abundance of evidence to support a jury finding that Dow Chemical "knew that breast implants were likely to be dangerous."

Dow Chemical's second argument is that there is no evidence that it "willfully and deliberately breached a duty to stop Dow Corning from selling breast implants."

I find this to be a very interesting and revealing contention. Dow Chemical seems to be saying that even if it did know that the breast implants were "likely to be dangerous," it would not be liable to users of the device

because it was under no duty "to stop Dow Corning from selling breast implants." The way Dow Chemical puts this argument goes to the very heart of its defense, which is: "We are merely a stockholder in Dow Corning; and, if Dow Corning decided to develop and market a dangerous product, we had no duty to stop them and, for that matter, did not have the power to stop Dow Corning if we so chose." If Dow Chemical had either the duty nor the right to "stop" Dow Corning "from selling implants," Dow Chemical could not be guilty for any misconduct engaged in by Dow Corning. The problem with Dow Chemical's argument, however, is that it fails to recognize that the jury could have found what might be said to be the real relationship between Dow Chemical and Dow Corning, which is that Dow Chemical "operated," "controlled," assisted and otherwise "jointly" worked with Dow Corning in the development and probably the marketing of this potentially dangerous product. Once this is recognized, the jury could have concluded that it makes just as much sense to say that Dow Corning "failed to stop" Dow Chemical as it does to say that Dow Chemical failed to stop Dow Corning. Again, Dow Chemical cannot rely on its "We-are-just-a-stockholder" defense. There is much more to it. Sure, if Dow Chemical were only a stockholder, it would have no duty, no right to "stop" Dow Corning from doing the things that it did; but the jury could, from this evidence, have found that Dow Chemical acted in a role that went far beyond just being a stockholder.

If the jury believed the evidence bearing on Dow Chemical's control over "the quality of [Dow Corning's] goods and services" and Dow Chemical's operation of Dow Corning, then it is not too large a step for the jury to have

found that both companies had "acted with conscious disregard of the safety" of Mrs. Mahlum.

Witness Dr. Marc Lappe gave powerful affirmation to the Mahlums' punitive damage case when he testified with a "strong and decisive yes" that Dow Chemical had "demonstrated conscious disregard for the safety and welfare of the ultimate users of products that it had direct or indirect control over." Dr. Lappe testified that for a protracted period extending up to the time of Miss Mahlum's implant, Dow Chemical by its own actions initiated control over toxicology testing in the '50s and '60s that would be done on components of Dow Corning breast implants. Thereafter, . . . they [Dow Chemical] participated in selecting for the test labs, they knew and referred Dow Corning to the proper testing individuals in their view.

Most persuasive to me is Dr. Lappe's testimony that "Dow Chemical had and did exercise control over what went into these external tests by actually designing the test for Dow Corning of what a toxicological assay would look like." (Citing the "specific test that moved [Dr. Lappe] the most," namely, a test laid out by Dow Chemical, in which "the analog of a breast implant," "miniature breast implants" were placed experimentally in dogs.)

Dr. Lappe's testimony is very much in harmony with the previously quoted language in the Dow Chemical-Dow Corning agreement of May 5, 1975, stating that Dow Chemical had control of Dow Corning's operations, "including the quality of its [Dow Corning's] goods and services." It seems to me that the jury had sufficient evidence to conclude that Dow Chemical and Dow Corning have been

in the silicone research business together for many years and that one of the products of their "joint research" was the Silastic II. It is difficult, then, to give much credence to the argument in Dow Chemical's brief that "it had no knowledge of any dangers associated with silicone gel breast implants." With regard to Dow Chemical's argument that it "did not willfully and deliberately breach[] a duty to stop Dow Corning form selling breast implants," the argument is misplaced. It continues to assume that Dow Chemical is only a stockholder and that it, therefore, has no duty to "stop" Dow Corning's illicit activities. The jury, as I have pointed out, could very well have found that Dow Chemical and Dow Corning shared a general duty to stop "selling breast implants" or, rather, not to sell them at all until proper testing had been done.

As I see Dr. Lappe's testimony, it has the value of being both opinion evidence and percipient evidence. Dr. Lappe gave his opinion, "based on all the evidence available to me,"[5] that Dow Chemical was guilty of a conscious disregard of Mrs. Mahlum's safety and welfare. The Dow Chemical brief is devoted to the inadmissibility of Dr. Lappe's testimony as to "due care" but says little or nothing about his "conscious disregard" testimony. Dr. Lappe qualified as an expert in the field of medical ethics, and I find nothing in Dow Chemical's arguments that would lead me to disregard Dr. Lappe's testimony or to say that it had not been properly considered by the jury.

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[5] Dr. Lappe testified that he had reviewed approximately 10,000 documents and that he had screened 205 CD-ROM disks, each of which had 20,000 or more pages that pertain to the documents involved in breast implant litigation.

Dr. Lappe gave testimony, based on his "understanding and knowledge of the standards for animal testing," to the effect that Dow Chemical did not conduct the studies that it did do "with an end in mind of protecting the public or use reasonable care in the design and conduct of follow-up studies to assure that results that suggested adverse finding could be confirmed or rejected." Even if the opinion portion of Dr. Lappe's testimony were to be rejected, Dr. Lappe provided supporting factual testimony for his opinion, testifying, without objection, that Dow Chemical had "concealed the hazards of the silicone fluids that went into silicone gel breast implants." There is no reason why the jury could not have properly concluded from this evidence that Dow Chemical did, in fact, conceal known dangers of silicone breast implants from persons whom Dow Chemical knew were going to be using the dangerous product. From the conclusion that Dow Chemical was concealing known dangers, the jury could reasonably have concluded from the facts of this case that Dow Chemical did so "willfully and deliberately" and, hence, in "conscious disregard of the safety of others."

The only remaining subject that calls for discussion is identification of the legal rubric that should be applied to cases in which a jury makes a specific finding that implied malice is present by reason of proof of a conscious disregard of the safety of others. A number of theories of liability may be properly applied to this case. The majority has affirmed the trial court's judgment that Dow Chemical negligently performed its undertaking to assist Dow Chemical in researching the safety of breast implants and advising Dow Corning with respect to the safety of its product. When we consider this tort liability in connection with the jury's having

concluded, by clear and convincing evidence, that Dow Chemical is guilty of implied malice, conscious disregard of Mrs. Mahlum's safety, we need go no further. We have tortious conduct on the part of Dow Chemical coupled with the requisites of implied malice. As I see it, this, by itself, supports a jury finding that Mrs. Mahlum is entitled to recover punitive and exemplary damages.

I would also note that plaintiffs have judgment in this case on the basis of Dow Chemical's having fraudulently concealed from Mrs. Mahlum and other breast implant recipients the dangerousness of this product. Judgment was entered on two bases: Dow Chemical's having aided and abetted Dow Corning's fraudulent misrepresentations and Dow Chemical's having acted in concert with Dow Corning in concealing the dangers.

I recognize, as maintained by Dow Chemical in its briefs, that Nevada has not recognized either concert of action or aiding and abetting as tort actions. This should not prevent this court from recognizing these torts in a case like this, where Dow Chemical controlled Dow Corning and worked hand-in-hand with Dow Corning in developing and marketing the Silastic II. Acting in concert is, to me, the clearer of the two actions because the jury could have believed that Dow Chemical was more of a principal than it was an aider and abettor. My own view is that the jury would have been entitled from the evidence submitted to it to decide that Dow Chemical was more culpable than Dow Corning, that Dow Corning was actually a relatively innocent agent of Dow Chemical, which directed and controlled the whole breast implant "operation." One does not have to go that far, however, to justify the jury's verdict and the punitive damage

award against Dow Chemical. All persons who received these implants were owed the duty to be informed that they were subject to the dangers that were inherent in the product that was designed, produced and marketed at the very least through the collaboration of the two Dow companies. Dow Chemical and Dow Corning shared a duty and responsibility to Mrs. Mahlum not to allow a dangerous product to be put into her body or, at the very least, to warn Mrs. Mahlum of the dangerousness of the product. Both Dow Chemical and Dow Corning are liable to Mrs. Mahlum for fraudulent concealment.

Although the jury's finding that Dow Chemical aided and abetted Dow Corning is not so substantial a case as its finding that the two companies acted in concert, I do not believe that the aiding and abetting judgment should be set aside. I see no reason why the jury in this case could not have found that Dow Chemical aided and abetted Dow Corning (although it is more likely that Dow Corning aided and abetted Dow Chemical in Dow Chemical's rush to corner the market in breast implants without conducting the proper human and animal epidemiological studies).[6]

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[6] It can be inferred from Dr. Lappe's testimony that Dow Chemical was motivated by haste in its decision to conceal information and thereby get the product on the market "before it was ready," so to speak. Dr. Lappe testified that he had studied the history of tests done by the two companies and that, up to the time that Mrs. Mahlum received her implant, Dow Chemical had never suggested to Dow Corning that Dow Corning or Dow Chemical do a long-term study on the material used in the implant. Dow Chemical did not advise Dow Corning that it was "seeing some inflammation . . . seeing some toxic effect, it's not iner[illegible]." Instead,

Dow Chemical argues in its brief that the aiding and abetting and the concert of action instructions "effectively allowed the jury to find Dow Chemical liable for fraud for failing to supervise Dow Corning's breast implant business." This to me is a very hollow argument and is based, again, on Dow Chemical's trying to convince this court that its only connection to "Dow Corning's breast implant business" was that it was just a stockholder. That Dow Chemical had a much larger role in the breast implant story than just as a stockholder in Dow Corning should be apparent to any reader of this record.

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testified Dr. Lappe, "Dow [Chemical] did not report key findings of adverse effects of components of Dow Corning's silicone based breast implants. They didn't report the studies on the composition of bleed. They did not report the studies that would demonstrate the toxicologic properties were of the known components of silicone gel." According to Dr. Lappe, "Dow Chemical had and did exercise control over what went into those external tests by actually designing the test for Dow Corning of what a toxicological assay would look like." Notwithstanding, according to Dr. Lappe, "Dow Corning directly concealed some of the most relevant information that would have been useful for physicians implanting devices and the scientific community studying the effects of silicone" and, particularly, the information "that silicone gel had profound immunologic activities, and that those immunologic activities could adversely affect the human body . . . ." The conclusion that can be drawn from the Lappe testimony is that this device was marketed at a time when far too little was known to enable patients to make an informed choice. Whether premature release of these devices was prompted by a desire to be first in the marketplace, I cannot say; but I do think that the jury would have been justified in so concluding and could have taken this as evidence of implied malice.

I understand that the jury denied liability on the civil conspiracy claim; but this does not mean that the two companies were not acting with one another to bring about a preconceived result, namely, to gain by marketing a product that was known to be dangerous or by marketing a product without adequately apprising its prospective users of the dangers inherent in the product's use.

I would have no hesitancy in affirming all of the trial court's judgments.

Springer, C.J.

MAUPIN, J., with whom SHEARING, J., joins, concurring in part and dissenting in part:

I join that part of the court's opinion reversing the Mahlums' intentional tort claims, but I would reverse the judgment in its entirety. I therefore dissent from the majority's decision to affirm the Mahlums' negligent undertaking claim.

As the majority notes, Dow Chemical and Corning Incorporated formed Dow Corning in 1943 to explore, develop, and undoubtedly, profit from silicone technology. From its inception, Dow Corning has maintained an impenetrable, separate corporate identity from its two parent corporations, such that the Mahlums abandoned any attempt to "pierce" the corporate veil dividing Dow Corning from Dow Chemical (at least as that term is used in the traditional sense).

Precluded from pursuing claims against Dow Chemical based on derivative liability, the Mahlums sought to establish that Dow Chemical, by its own actions, was responsible for the injuries to Mrs. Mahlum allegedly caused by Dow Corning's silicone breast implants.[1] At trial, the Mahlums succeeded in convincing the jury that Dow Chemical was liable for several intentional torts, as well as the tort of negligent performance of an undertaking.

The jury found Dow Chemical liable for the negligent performance of an undertaking pursuant to Restatement (Second) of Torts § 324A. The definition of this tort, often referred to as the Good Samaritan rule, is as follows:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to perform his undertaking if
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> (a) his failure to exercise reasonable care increases the risk of such harm or

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[1] I wish to emphasize that any conclusions I have drawn regarding Dow Chemical's liability have no implications as to the Mahlums' action against Dow Corning. It has not escaped my attention that Dow Corning sought bankruptcy protection on the eve of trial, thus neutralizing the traditional direct products liability claims the Mahlums may have had against it and leaving them to proceed to trial solely against Dow Chemical.

> (b) he has undertaken to perform a duty owed by the other to the third person or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Restatement (Second) of Torts § 324A (1979) [hereinafter section 324A].

I find the majority's analysis of the section 324A claim against Dow Chemical troubling for several reasons.

First, the majority appears to ignore a basic and, by any standards, a reasonable precept regarding duty in a negligent undertaking action: that a plaintiff asserting a section 324A claim must show that the defendant specifically undertook to perform the task that he is charged to have performed negligently. *See In re Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig.*, 113 F.3d 1484, 1493 (8th Cir. 1997) ("TMJ Implants") ("The scope of th[e] undertaking defines and limits an actor's duty under section 324A."). Further, a close examination of the tests of liquid silicone does not show that Dow Chemical undertook a duty to ensure the safety of the final product, silicone gel breast implants.

Second, even assuming that Dow Chemical did undertake to perform safety-testing of the silicone fluid that five to ten years later came to be used in Dow Corning's breast implants, the majority fails to cite any evidence in the record demonstrating that Dow Chemical negligently performed that undertaking.

Third, the majority fails plausibly to show the proximate nexus between this alleged breach and the harm that Charlotte Mahlum suffered.

Fourth, the result of the majority's decision is that a research facility that tests some component, with or without knowledge of its purpose, may now be deemed to have undertaken an everlasting duty to supervise, monitor, and control a manufacturer's use of the component in any and all future products, or face infinite liability.

DOW CHEMICAL'S ALLEGED UNDERTAKING AND DUTY

Like any other claim of negligence, a threshold element of a negligent undertaking claim is the existence of a duty to use due care towards another's legally protected interest. *See Perez v. Las Vegas Medical Center*, 107 Nev. 1, 4, 805 P.2d 589, 590-91 (1991) (observing that to prevail on a negligence theory, the plaintiff generally must show five elements, the first of which is that the defendant had a duty to exercise due care towards the plaintiff). In determining whether such a duty exists, this court has held that it is the courts and not juries that have the ultimate responsibility to define the scope of duty in relation to particular circumstances and to define the legal standard of reasonable conduct in light of the apparent risk. *See Ashwood v. Clark County*, 113 Nev. 80, 84, 930 P.2d 740, 742 (1997). Consequently, whether evidence presented by the plaintiffs is sufficient to create a legally cognizable duty is a question for the courts. *See Artiglio v. Corning Inc.*, 18 Cal. 4th 604, 957 P.2d 1313, 1318 (Cal. 1998) ("Whether this essential prerequisite to a negligence cause of action has been satisfied in a particular

case is a question of law to be resolved by the court."); *Smith v. Allendale Mut. Ins. Co.*, 410 Mich. 685, 303 N.W.2d 702, 710 (Mich. 1981) (rejecting argument that the extent and nature of an undertaking under section 324A are questions of fact for the jury; rather, it is "for the court to determine what evidence is minimally necessary to establish the elements of a relationship on which tort liability may be premised"); *Matter of New York State Silicone Breast Implant Litig., 166 Misc.* 2d 299, 632 N.Y.S.2d 953 (Sup. Ct. 1995) ("Matter of N.Y. State Silicone") (addressing a similar claim of negligent undertaking against Dow Chemical by breast implant recipients, holding that "the question of whether a duty is owed in the first instance is a legal issue to be resolved by the court"), aff'd, 227 A.D.2d 310, 642 N.Y.S.2d 681, appeal dismissed, 89 N.Y.2d 889, 676 N.E.2d 493, 653 N.Y.S.2d 911 (N.Y. 1996). There is insufficient evidence in the record to support a conclusion that Dow Chemical owed a duty towards Dow Corning's breast implant recipients.[2]

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[2] I would also decline to follow, as the Mahlums urge, the federal district court decision in *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 887 F. Supp. 1455 (N.D. Ala. 1995) ("In re Silicone Gel") (holding that the foreseeability of harm to third persons alone may be sufficient to create a duty to the third persons). A basic tenet of tort negligence law is that foreseeability, while a predicate of negligence liability, is insufficient by itself to establish duty. *Ashwood*, 113 Nev. at 85, 930 P.2d at 743; *see also In re New York State Silicone Breast Implant Litig.*, 642 N.Y.S.2d 681 (App. Div. 1996) ("In re N.Y. State Silicone") (refusing to follow In re Silicone Gel); *TMJ Implants*, 113 F.3d 1484 (8th Cir. 1997) (same).

Other courts confronted with similar facts have found no duty under section 324A. A New York court concluded that Dow Chemical lacked a duty to the ultimate purchasers of breast implants because: (1) there was only a "tenuous connection" between Dow Chemical and those ultimate purchasers, (2) Dow Chemical never provided or undertook to provide the plaintiffs with any services, any information, or any product, (3) there was no evidence that the ultimate purchasers of the breast implants ever relied on Dow Chemical or on any information that Dow Chemical provided to Dow Corning in making a decision to purchase breast implants, and (4) there is no evidence that Dow Chemical had any contact with the plaintiffs or knew their identity. *Matter of N.Y. State Silicone*, 632 N.Y.S.2d at 956. "Thus, plaintiffs cannot establish a sufficient relationship between themselves and Dow Chemical to justify imposing a duty on Dow Chemical." *Id.* The court made further observations that are important to note:

> "While moral and logical judgments are significant components of the analysis, we are also bound to consider the larger social consequences of our decisions and to tailor our notion of duty so that 'the legal consequences of wrongs [are limited] to a controllable degree.'"
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> . . . .
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> [The New York Court of Appeals] has "limited the universe of permissible plaintiffs because a failure to do so would impose a duty of reasonable care enforceable by any member of

> an indeterminate class of persons, present and prospective, known and unknown, directly or indirectly injured by any negligence." The court noted that "the hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences."
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> . . . .
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> Although Dow Chemical may have had a duty to the actual users of its research such as Dow Corning, that liability does not extend ad infinitum to any potential ultimate user of a product which contains a silicone component. Dow Corning has over the years been in the business of manufacturing silicone related products for thousands of applications. If this court were to hold that Dow Chemical assumed a duty of care based on its silicone related testing and consulting to every potential ultimate consumer of a product which contained silicone, the duty imposed on Dow Chemical would be indeterminate and infinite.

632 N.Y.S.2d at 955, 956-57 (quoting *Waters v. New York City Housing Authority*, 69 N.Y.2d 225, 505 N.E.2d 922, 513 N.Y.S.2d 356 (N.Y. 1987), and *Eiseman v. State of New York*, 70 N.Y.2d 175, 511 N.E.2d 1128, 518 N.Y.S.2d 608 (N.Y. 1987)). The Appellate Division affirmed the court's decision, concluding that "[a] party who gives advice to a manufacturer of consumer goods does not owe a duty to then-

unknown individual purchasers of the manufacturer's goods[.]" *In re N.Y. State Silicone*, 642 N.Y.S.2d at 682. I believe, as the New York court did, that to impose liability on Dow Chemical under these facts would be to endorse a duty that is indeterminate and infinite.

Likewise, the Eighth Circuit Court of Appeals noted that "an actor's specific undertaking of the services allegedly performed without reasonable care is a threshold requirement to section 324A liability. . . . Accordingly, courts have refused to impose liability under section 324A without a showing that the defendant undertook a duty with respect to the specific product that caused the injury." *TMJ Implants*, 113 F.3d at 1493 (citations omitted). The TMJ Implants court concluded that, to establish liability under section 324A, plaintiffs had to prove that Dow Chemical undertook a duty with respect to TMJ implants. Id. Like the plaintiffs in our case, the TMJ plaintiffs argued that Dow Chemical assumed such a duty by "undertaking to render services to Dow Corning through its trademark agreements with Dow Corning and through its silicone research and testing performed for Dow Corning and that Dow Chemical should have recognized that these services were necessary for the protection of plaintiffs." *Id.*[3] The TMJ court concluded that Dow Chemical did not undertake a duty, either under the trademark agreement, or through silicone testing, or because Dow Corning lacked an adequate laboratory.

The silicone research allegedly performed by Dow Chemical at the request of Dow Corning also does not

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[3] The trademark agreement is addressed below.

demonstrate an undertaking sufficient to impose liability on Dow Chemical under section 324A. For section 324A liability to attach, Dow Chemical must have specifically undertaken the task of ensuring the safety of Dow Corning's TMJ implants or of ensuring the safety of Dow Corning's entire array of silicone products. Plaintiffs contend that Dow Chemical undertook a duty with respect to all of Dow Corning's silicone products, but the record shows that Dow Chemical never tested the use of silicone in any medical implants and that Dow Chemical never was informed that any of the silicones it tested would be used in medical implants. . . . [P] Plaintiffs can point only to Dow Chemical's performance of approximately a dozen tests involving silicone (but not its use in medical implants) performed over four decades at the request of Dow Corning, . . . a 1948 and a 1950 article published by three Dow Chemical scientists [i.e., the articles by Dr. Rowe] discussing toxicological research on various silicones, and a trademark agreement allowing Dow Chemical to inspect the quality of Dow Corning's products. However, these Dow Chemical actions and Dow Corning's purportedly inadequate laboratory facilities are insufficient to establish an undertaking of such breadth and magnitude as to create a duty on the part [of] Dow Chemical to ensure the safety of all of Dow Corning's silicone products.

TMJ Implants, 113 F.3d at 1495 (citations and footnote omitted).

In addition, the California Supreme Court held that silicone breast implant plaintiffs failed to make a case under section 324A based on much of the same evidence that is now before this court. *See Artiglio*, 957 P.2d at 1318-21. The Artiglio court noted:

> "The foundational requirement of [section 324A] is that in order for liability to be imposed upon the actor, he must specifically have undertaken to perform the task that he is charged with having performed negligently, for without the actual assumption of the undertaking there can be no correlative duty to perform that undertaking carefully."

957 P.2d at 1318 (quoting *Blessing v. United States*, 447 F. Supp. 1160, 1188-89 (E.D. Pa. 1978)). After reviewing the evidence the court stated:

> In sum, the record before the trial court on summary judgment would not support a finding that Dow Chemical's was "an undertaking of such breadth and magnitude as to create a duty on the part of Dow Chemical to ensure the safety of all of Dow Corning's silicone products." Moreover, many years elapsed between Dow Chemical's seminal toxicology research activities on behalf of Dow Corning and plaintiffs' alleged injuries. When that research was done, any possible consequence for plaintiffs -- who years later allegedly received medical treatments traceable to its influence -- was exceedingly attenuated and remote. We conclude that, at the times Dow Chemical allegedly conducted or reported for Dow Corning the toxicology research services on which plaintiffs premise their section 324A claim, it cannot reasonably be concluded that Dow Chemical "should [have]

> recognized" those services were "necessary for the protection of" (§ 324A) plaintiffs. Accordingly, under the theory articulated in section 324A, no duty of care running to plaintiffs arose from Dow Chemical's undertaking.

Artiglio, 957 P.2d at 1320 (alteration in original) (quoting *TMJ Implants*, 113 F.3d at 1495, and section 324A).

The Mahlums cite *Wright v. Schum*, 105 Nev. 611, 781 P.2d 1142 (1989), for the proposition that a duty arises when a defendant asserts control over a person for whom that defendant undertakes a task. In Wright, our only prior case specifically dealing with a section 324A claim, a tenant's dog escaped the premises, and attacked and severely injured a child. Prior to the incident, the landlord had voluntarily implemented safety measures to have the dog secured within the tenant's yard, for the protection of the general public. The evidence showed that the landlord had exercised his control over the tenant's behavior by threatening eviction if the tenant did not comply with the request to secure the dog. Because the landlord had assumed to some degree the duty of securing the dog -- originally only the tenant's duty -- and then negligently performed that duty, the negligent undertaking claim against the landlord was allowed to go before a jury. *Id.*

The case at bar bears little resemblance to the facts in Wright. That Dow Corning lacked a toxicology laboratory until 1968 and commissioned Dow Chemical to perform various toxicology tests provides no reasonable basis for concluding that Dow Chemical "controlled" Dow Corning's development or testing of breast implants. The other evidence

in support of this contention, including the trademark agreement, also fails to establish such an inference. Accordingly, the evidence was legally insufficient to show that Dow Chemical controlled Dow Corning regarding the creation and safety of its breast implants.[4]

The Mahlums argue that the trademark agreement between Dow Chemical and Dow Corning is indicative of an undertaking and of control. The trademark agreement, however, does not, in my view, support the liability claims brought by the Mahlums. In 1975, Dow Corning and Dow Chemical memorialized an agreement in which Dow Chemical licensed the "Dow" trademark to Dow Corning. The agreement recited that Dow Chemical had established a valuable reputation under its corporate name "Dow." The agreement confirmed and ratified Dow Corning's use of the Dow mark, so that the valuable reputation established in the name Dow would be passed on to Dow Corning. The agreement also provided as follows:

> The products manufactured, distributed and sold or any services rendered under The Corporate Title [Dow Corning Corporation], The Trade Name [Dow Corning], The Design Trademark [double rectangle], or other

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[4] I note that Wright also undercuts the emphasis that the majority places on Dr. Rowe's role as a consultant to Dow Corning. This court specifically noted in that case "that the mere advice or warning by one person to another that care should be taken to avoid a certain risk does not in itself create an undertaking and consequent liability on the part of one giving such advice." *Wright*, 105 Nev. at 614, 781 P.2d at 1145.

> trademarks containing, consisting of or comprising "DOW CORNING" shall be of a nature and quality that is acceptable to Dow [Chemical] Company and shall not damage or reflect adversely on the reputation or goodwill associated with the name and mark "DOW". When requested, [Dow Corning] shall at reasonable times and places submit specimens of its products to Dow [Chemical] Company and shall permit inspection of [Dow Corning's] premises at reasonable times . . . to examine the quality of such products.

The agreement stated that Dow Chemical and Corning had "controlled" the operations and the quality of goods and services of Dow Corning since that company's inception in 1943. *Id.* Dow Chemical thus maintained the authority to approve products using the Dow Corning mark. Dow Chemical could also require that Dow Corning terminate all use of the name Dow or any product not approved by Dow Chemical.

The Mahlums argued at trial and on appeal that the agreement demonstrated that Dow Chemical controlled the operations of Dow Corning and that Dow Chemical had the right to inspect and approve Dow Corning's breast implants. Dow Chemical argued that the agreement has little significance and that the language regarding control was required under the Lanham Trademark Act of 1946, 15 U.S.C. § 1051. According to Dow Chemical, there is no evidence that Dow Chemical exercised any control under this agreement regarding Dow Corning's breast implants. The head of Dow Corning's breast implant business testified that

Dow Chemical never exercised any control over Dow Corning's breast implant business, and that he never knew of the agreement's existence.

One of the leading authorities on trademarks states that "licensing a mark without adequate control over the quality of goods or services sold under the mark by the licensee may cause the mark to lose its significance as a symbol of equal quality -- hence, abandonment." J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, § 17:6, at 17-6 (4th ed. 1998) (McCarthy). "Today, trademark licensing is permitted so long as the licensor maintains adequate control over the nature and quality of goods and services sold under the mark by the licensee." *Id.*, § 18:42, at 18-66. The licensor thus has a duty to control the quality of the goods and services sold under the mark; if it fails to do so, it may forfeit its right to the mark. *See id.*, §§ 18:66-68; *Dawn Donut Co. v. Hart's Food Stores, Inc.*, 267 F.2d 358 (2d Cir. 1959).

In this case, no significance should attach to the agreement as evidence of Dow Chemical's "control" of Dow Corning, or evidence of conspiracy or concert of action to make misrepresentations to consumers of Dow Corning's breast implants. The "control" language was almost certainly placed in the agreement to protect Dow's right to the name "Dow" when associated with the "Dow Corning" mark. There is no evidence that Dow Chemical exercised any control or even inspected Dow Corning's breast implants under this agreement. Indeed, the evidence is that it did not.

In another silicone breast implant case, Artiglio, the California Supreme Court stated, "while the trademark and tradename agreements may have conferred upon Dow

Chemical certain inspection rights, there is no suggestion that the agreements imposed a duty to perform tests, let alone that they constituted a general undertaking by Dow Chemical to guarantee the safety of Dow Corning's silicone product lines." *Artiglio*, 957 P.2d at 1320. The court found no evidence that Dow Chemical inspected any Dow Corning product or provided any service to Dow Corning pursuant to such agreements. Id. As noted above, the Artiglio court ultimately rejected the claim that Dow Chemical was liable under section 324A.

The Eighth Circuit Court of Appeals reached a similar decision in TMJ Implants. In the that case, the Eighth Circuit considered the trademark agreement at hand pursuant to an argument that Dow Chemical was liable under a theory of negligent undertaking for damages caused by Dow Corning TMJ products. Plaintiffs argued that Dow Chemical assumed a duty with respect to TMJ implants by undertaking to render services to Dow Corning through trademark agreements. The Eighth Circuit rejected the argument:

> The record . . . contains no evidence to show that Dow Chemical undertook to render services to Dow Corning through its trademark agreements. A standard trademark agreement, in and of itself, does not establish an affirmative duty to inspect that could result in tort liability to third parties, and nothing in the record suggests that these are other than standard trademark agreements. Plaintiffs can point to no evidence that Dow Chemical in fact inspected any Dow Corning product or provided any services to Dow Corning

> pursuant to these agreements. These agreements can only be viewed, then, as a vehicle for Dow Chemical to protect its intellectual property rights, and thus they do not represent an undertaking on the part of Dow Chemical to render services to another. Accordingly, these agreements do not trigger section 324A.

TMJ Implants, 113 F.3d at 1494 (citations omitted).

In other product liability cases, plaintiffs have argued that the existence of control language in a trademark agreement can make a defendant licensor liable for failure to inspect a product bearing its trademark but made by another company. But existence of language of control in such an agreement does not make the licensor liable for defects in the licensee's products.

Under this body of law, the sole consequence of a trademark owner's failure to exercise control over its licensees is the potential loss of the rights associated with the trademark. None of these cases suggests, in any way, that a trademark owner's failure to exercise control subjects the owner to affirmative liability in tort for damages caused by a defective product bearing its trademark.

Burkert v. Petrol Plus of Naugatuck, Inc., 216 Conn. 65, 579 A.2d 26, 32 (Conn. 1990) (citing S. Sandrock, Tort Liability of a Non-Manufacturing Franchisor for Acts of Its Franchisee, 48 U. Cinn. L. Rev. 699, 706 (1979)).

Like the plaintiffs in Artiglio and TMJ Implants, the Mahlums argue that Dow Chemical assumed a duty of care towards them by performing certain toxicological tests on liquid silicones for Dow Corning and by maintaining a "relationship of control" over Dow Corning. They rely on Dow Chemical toxicologist Dr. V. K. Rowe's various connections to Dow Corning's silicone testing as a basis for Dow Chemical's undertaking of this duty. My review of the record compels me to disagree.

The Mahlums and the majority emphasize, without fully describing their nature, the multitude of toxicological tests Dow Chemical performed for Dow Corning from the 1940s into the 1960s.[5] Given their obvious importance, a closer review of what these tests revealed appears warranted. There are over a hundred tests in the record comprising the so-called "component testing" Dow Chemical performed for Dow Corning. Nearly all of these tests are what are termed toxicological "industrial handling" tests: i.e., the purpose of these tests is to discover what safety measures should be undertaken by the employees who handle the tested material in the manufacturing process. The following is an excerpt from a typical test report Dow Chemical submitted to Dow Corning from the 1940s into the 1960s:

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[5] The Mahlums and the majority observe that one Dow Corning employee testified that "every new organosilicon" from Dow Corning was sent to Dow Chemical for testing. The same testimony went on to qualify, however, that the procedure was to evaluate the silicones "for [their] potential hazards just in material handling. That was simply a safety procedure."

Subject: THE RESULTS OF RANGE FINDING TOXICOLOGICAL TESTS ON METHYL HYDROGEN MIXED CYCLICS

PROBLEM

The sample of methyl hydrogen mixed cyclics which were [sic] submitted to us on September 4, 1956 is being handled for the preparation of foam resins. What precautions must be taken to handle this material safely?

CONCLUSIONS

This material has a low acute oral toxicity, the LD50 for rats being greater than 2 gm./kgm. of body weight. It is essentially without effect on contact with the eyes and with the skin, and apparently is not absorbed through the skin in acutely toxic amounts. Vapor concentration attainable at room temperature should not present a problem upon single vapor exposure. However, when the material is heated to 100 [degrees] C very slight irritation to the eyes may be expected.

This material does not appear to present any unusual health hazards. The practice of ordinary care and cleanliness should be sufficient to avoid difficulties in handling.

These conclusions are based upon range finding toxicological tests and are limited to precautions for industrial handling of the material. The development of specific uses for

this material will make it necessary to give careful consideration to the health problems presented and to the need for further toxicological studies.

(Emphasis added.)

This report exemplifies the type of testing Dow Chemical performed for Dow Corning prior to the invention of silicone breast implants in 1962; over a hundred other Dow Chemical toxicological reports in the record on Dow Corning's silicone compounds mirror its format and language. Further, from time to time, Dow Corning would inform Dow Chemical of the potential use of the tested material. In such an instance, Dow Chemical often would include an opinion on the suitability of the substance for the contemplated use based on the available information provided by the range finding test; however, even these reports ended by specifically noting that the conclusions were ultimately reliable only as to industrial handling purposes and that any specific uses in products should undergo further, extensive toxicological testing. At most, these tests may support the hypothesis that Dow Chemical undertook a duty towards Dow Corning's employees to competently test for potential handling hazards of Dow Corning's chemical substances. *Cf. Miller v. Bristol-Myers, Co.*, 168 Wis. 2d 863, 485 N.W.2d 31 (Wis. 1992) (holding that a parent corporation may be liable for unsafe conditions at a subsidiary where it assumed a duty to act by affirmatively undertaking to provide a safe working environment at the subsidiary).[6] These tests do not create,

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[6] The Mahlums argue that, according to Restatement section 324A, "any undertaking to render services to another" can impose

however, a reasonable inference that Dow Chemical undertook a duty to ensure the safety of Silastic breast implants, or any Dow Corning product for that matter, by testing Dow Corning's silicone compounds for a limited purpose.[7]

Other tests the majority relies upon include the 1948 article co-written by Dr. Rowe, the 1956 Chenoweth study showing silicone migration, the 1957 Miami study showing that DC 200 fluid decreased the number of white blood cells in female rat tails, the 1967 dog miniature implant study, and the 1970 Sparschu pathology report showing migration of silicone to bone marrow.

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liability on a defendant. See section 324A, cmt. b. Comment b, however, is entirely consistent with the clarification of section 324A given by the courts, namely that the scope of the undertaking logically limits the scope of liability to follow. Thus, the scope of the undertaking regarding toxicological tests for industrial handling purposes limits Dow Chemical's potential liability exposure to industrial injuries. Dow Chemical's possible liability based on other testing is discussed in the text above.

[7] It is undisputed that there exist thousands of different organosilicon compounds and that different formulations of these compounds possess different properties, i.e., organosilicons are not fungible chemicals. Further, silicones (a shorthand way of referring to organosilicons) come in various forms: compounds, resins, fluids, and hard, rubber-like substances. The particular form silicone may take matters, and the testing results of one type of form, such as the rubber form, do not automatically apply to another form, such as the fluid.

The 1948 article, entitled Toxicological Studies on Certain Commercial Silicones and co-authored by Dow Chemical's toxicologist, Dr. Rowe, was printed in the Journal of Industrial Hygiene and Toxicology, Vol. 30, No. 6, pp. 332-52. According to the Mahlums, this article misrepresented to the scientific community that silicones were harmless and posed no threat to human health. However, the purported misrepresentation that all silicones are inert was included in a section entitled "Discussion of Practical Handling Problems," where it states that "toxicological studies conducted with representative silicone materials show that the silicones as a group have a very low order of toxicity. When these materials are considered from a practical viewpoint, the hazards they present are exceedingly minor." Once again, the article was specifically addressing industrial hazards. Further, the article does not represent that silicones have no toxicity whatsoever.[8] Rather, it reports skin and eye irritations observed in the test subjects, but concludes that industrial exposure to the substances presents no significant danger. The final sentence of the article concludes as follows: "Toxicological studies with laboratory animals have shown

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[8] For example, immediately after stating that silicones as a group pose minor hazards, the article states that "the volatile hexamethyldisiloxane is a good solvent, and as with any good organic solvent, repeated and prolonged skin contact should be avoided. The material is immediately painful to the eyes but causes no corneal damage." Dr. Rowe testified in this case that at the time he did not know that silicones were to be used in medical devices. He also observed that the article merely states that the materials studied under the specific set of circumstances described in the article showed no adverse toxicological effects; he believed that such results would hold true even today.

that the silicones (methyl and mixed methyl and phenylpolysiloxanes) as a class are very low in toxicity and that they present no significant handling problems."

Next, the 1956 Chenoweth study is an internal Dow Corning study conducted by two Dow Corning scientists and one Dow Chemical scientist, Dr. M. B. Chenoweth. It examined the physiological assimilation of the DC 200 fluid, which was a silicone fluid used for industrial purposes. DC 200 was mixed with an antifoam emulsion and orally administered to three animals: one albino rat and two dogs. No evidence of assimilation was found in the rat, but traces of siloxane were found throughout the bodies of both dogs. Another rat was given an intramuscular injection of the fluid, and siloxane was also found throughout its body in very low concentrations. This study did not address whether the trace amounts of siloxane found in the various organs of the animals harmed the animals or not. I also note that Dr. Chenoweth's role in the study was comprised of "preoperative care, administering of the labeled fluid, sacrificing, and dissecting of the animals."[9] The Dow Chemical radiochemical laboratory also "cooperated" in the analysis of the tissue samples from the animals along with, it appears, Dow Corning's analytical laboratory. Thus, this study was a Dow Corning study with some cooperation from Dow Chemical. There is nothing in Dow Chemical's participation that would serve as a clear warning signal to Dow Chemical that the medical use of silicone should be abandoned.

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[9] Dr. Chenoweth's signature is missing from the copy of the report signed by the other two authors, Dow Corning scientists.

The 1957 Miami study, the results of which showed that DC 200 fluid depressed the granulocytic elements of the tail blood of female rats, was not conducted by Dow Chemical. However, Dr. Rowe was approached by Dow Corning to set up the study, and he designed the test protocol for Professor Deichmann from the University of Miami. Two versions of this study were prepared by Professor Deichmann, one reporting on the effects of six silicone materials, and the other reporting only on five. The Mahlums argued at trial that the two Dow companies were in cohorts in either preparing or publishing the five materials report to conceal the harmful effects of the sixth silicone material. This assertion is not supported by the record. First, the sixth material that was omitted in the report on five silicone materials is a substance identified only as "Z-4141," and the Mahlums do not contend that Z-4141 is contained in Dow Corning's breast implants. Thus, its effects, whether harmful or not, have no bearing on the Mahlums' claims. Second, there is no evidence to suggest that Dow Chemical (via Dr. Rowe or otherwise) played any part in creating the second report. The evidence thus indicates that Dow Chemical had no role in attempting to hide the effects of "Z-4141."[10]

The Mahlums also cite the 1970 pathology report prepared by a Dow Chemical scientist, Dr. Gary L. Sparschu, as another link establishing Dow Chemical's undertaking to

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[10] The 1957 Miami study tested DC 200, an industrial grade of the DC 360 medical grade fluid used in Silastic II breast implants. DC 360 was not utilized in Dow Corning's breast implants until 1975 -- when Silastic I was first marketed. Prior to 1975, it appears that another Dow Corning silicone fluid, DC 330, was used in its breast implants.

ensure the safety of silicone gel breast implants. This study injected rats, male and female, with different doses of DC 360, intraperitoneally and subcutaneously. The pathological results showed traces of the silicone fluid throughout the animals' bodies, including the bone marrow. The male rats in one group showed decreased liver weights, and the female rats in another group had decreased brain weights. The report concluded, however, that "these findings do not appear to be associated with treatment because the effect is not dose related." An inflammatory reaction was not associated with the deposition of DC 360 in the organs. Again, given that the Mahlums do not assert that Dow Chemical performed any of its tests negligently, and that this report found no significant dangers of DC 360, we are left only to speculate as to how this report also should have raised an alarm for Dow Chemical to publish this information.

In a letter from the independent laboratory, Food and Drug Research Laboratories, Inc. (FDRL), to Dow Corning in 1964, FDRL submitted a revised proposal on certain polysiloxane studies pursuant to Dow Corning's modifications "as well as [its] conversations with Dr. V. K. Rowe at the Gordon Research Conference recently." This is the only link connecting Dr. Rowe, and therefore Dow Chemical, to the 1964 polysiloxane dog studies performed by FDRL for Dow Corning. In 1964, FDRL began conducting a long-term (2 years) study of silicone migration (including that of DC 360 when injected) in animals and the extent to which the compounds remain in animal tissues. FDRL reported its results to Dow Corning in 1968.

In 1967, a second two-year study of miniature implants in dogs was performed by the same independent

testing laboratory for Dow Corning. The evidence linking Dow Chemical to this study was that Dr. Rowe was one consultant among several who recommended that the study be done. These FDRL studies show that Dow Corning was not relying on Dow Chemical's alleged undertaking as having established the safety of silicone gel breast implants.

The Mahlums conceded that Dow Chemical properly executed the tests that it performed for Dow Corning. Instead, the Mahlums alleged that Dow Chemical was negligent in failing to recommend further studies to ensure that silicone fluids could safely be used in its breast implants. The record, however, shows that Dow Chemical did make such a recommendation regarding Silastic implants. In 1967, Dr. Rowe recommended, presumably in his role as an advisor, to Dow Corning's product safety committee that long-term testing of miniature implants in dogs be conducted to establish the safety of Silastic implants. In response to this recommendation, Dow Corning commissioned the 1967 FDRL long-term study.

In summary, proof at trial identified a series of tests that Dow Chemical performed for Dow Corning at Dow Corning's request. Dow Chemical performed these studies and reported them to Dow Corning. There is no proof suggesting that Dow Chemical manipulated the results or failed to report them accurately to Dow Corning. It was then Dow Corning's responsibility to interpret these tests and make decisions regarding the information contained therein regarding its product line. Dow Corning was a creature of state corporate law, a deliberately-created separate and economically independent entity that was specifically spun-off from Dow Chemical and Corning Incorporated in order to

develop silicones for the marketplace. Dow Corning was not undercapitalized, not created as a vehicle for fraud or abuse, and was subject to proper corporate formalities; it was not, in other words, an alter ego of Dow Chemical and/or Corning Incorporated. Dow Chemical did not undertake to perform tasks for Dow Corning that Dow Corning was specifically created to perform, namely, to design, manufacture, and market silicone products.

DOW CHEMICAL'S ALLEGED BREACH

As I stated earlier, the majority fails to cite any convincing evidence in the record demonstrating that Dow Chemical negligently performed the alleged undertaking. Dow Chemical's breach, according to the majority, was that it failed to prevent Dow Corning from marketing silicone breast implants, given its relationship to the subsidiary as a parent corporation and as a consultant, and it failed to warn the public about the dangers of silicone breast implants. This analysis applies only if one concludes that Dow Chemical had a duty to control Dow Corning's product decisions. There is no evidence in the record that Dow Chemical had any such duty.

The California Supreme Court in Artiglio stated that "'the duty of a "good Samaritan" is limited. Once he has performed his voluntary act he is not required to continue to render aid indefinitely.'" 957 P.2d at 1319 (quoting *Baker v. City of Los Angeles*, 188 Cal. App. 3d 902, 233 Cal. Rptr. 760 (Ct. App. 1986)). "Thus, 'a Good Samaritan who has performed a series of voluntary acts in the past is not thereafter required indefinitely to continue performing such acts into the future.'" *Id.* (quoting *City of Santee v. County of*

San Diego, 211 Cal. App. 3d 1006, 259 Cal. Rptr. 757 (Ct. App. 1989)). It is undisputed that Dow Chemical performed what testing it did non-negligently. Legally, Dow Chemical was not obligated to do more. Dow Chemical was not under a permanent duty to keep track of Dow Corning's silicone fluid products, ascertain whether such products were harmful, and manipulate Dow Corning into stopping production. Accordingly, it cannot be said that Dow Chemical breached any duty.

LACK OF PROXIMATE CAUSE

The majority concludes that Dow Chemical was negligent for failing to oversee and prevent Dow Corning from designing and marketing the breast implants when it had the "power" to do so. Even assuming negligence, Dow Chemical's actions in the 1950s and 1960s cannot be the proximate cause of any harm to Mahlum after she received her breast implants in 1985.

Several reasons support my conclusion. First, when Dow Chemical performed silicone tests on DC 200 or DC 360 for Dow Corning prior to the invention of silicone gel breast implants, Dow Chemical could not have foreseen the uses to which Dow Corning would put these silicone fluids. In Artiglio, the California Supreme Court noted that "many years elapsed between Dow Chemical's seminal toxicology research activities on behalf of Dow Corning and plaintiffs' alleged injuries. When that research was done, any possible consequence for plaintiffs -- who years later allegedly received medical treatments traceable to its influence -- was exceedingly attenuated and remote." *Artiglio*, 957 P.2d at 1320. Second, Dow Corning also performed its own product

safety testing, specifically on breast implants, from the early 1960s onward. By contrast, Dow Chemical never tested silicone gel breast implants. In addition, Dow Corning relied upon safety testing by Dr. Cronin in the early 1960s before marketing its breast implants. Third, the Mahlums contend that Dow Corning was aware of possible biological effects and migration of silicone fluids from late 1960s onwards; if true, then Dow Corning could not have been relying upon Dow Chemical to ensure the safety of silicone gel breast implants.

CONCLUSION

Finally, the majority holding with regard to the claim of negligent undertaking will have far-reaching implications on our jurisprudence. As mentioned above, Dow Chemical and Corning Incorporated created Dow Corning as a separate entity under corporate legal principles. There is no suggestion that Dow Corning is or was underfunded or a product of fraud or abuse. Indeed, the Mahlums explicitly abandoned their alter ego theories in this case. Yet the Mahlums and this court seek to make Dow Chemical responsible for Dow Corning's alleged product failures.[11]

Additionally, in performing tests and advising on how other tests should be performed, Dow Chemical often served in the role of consultant. It is also in that role of consultant that the Mahlums and this court seek to render Dow Chemical

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[11] I do not mean to criticize the Mahlums for their attempts to adapt tort liability concepts to this problem. The untimely departure of Dow Corning from this litigation made the Mahlums' task in establishing liability most difficult indeed.

liable in tort for allegedly undertaking responsibilities that were properly Dow Corning's. The majority now states, in effect, that it will hereafter require companies (i.e. consultants) to publish unfavorable test results that they have done for their clients. This duty will also require an attendant duty of consultants to monitor their client's new products, to determine whether their research is implicated in those products. Neither the law nor public policy justifies such a result.

The Mahlums thus lacked evidence to establish that Dow Chemical ever undertook a duty to test the safety of the silicone fluid used in Dow Corning's breast implants or undertook a duty to test and guarantee the safety of the breast implants themselves. The jury's verdict on the Mahlums' claim of negligent performance of an undertaking should not stand. I therefore dissent from the affirmance of the claim of negligent undertaking, and would reverse the judgment in its entirety.

Maupin, J.

I concur:

Shearing, J.

Supreme Court, U.S.
FILED
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(2)

No. 01-1686

In the Supreme Court of the United States

CLASS FIVE NEVADA CLAIMANTS,

Petitioners,

v.

DOW CORNING CORPORATION, DEBTOR; OFFICIAL COMMITTEE OF TORT CLAIMANTS; THE DOW CHEMICAL COMPANY; CORNING INCORPORATED; ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should review the Sixth Circuit's interlocutory decision when that court remanded for factual findings that may render the petition moot.

2. Whether the Sixth Circuit erred in following every other court of appeals that has addressed the question in ruling that a bankruptcy plan of reorganization may include a release of non-consenting creditors' claims against non-debtors where the plan provides for payment of those creditors' claims, where the release is necessary to resolve complex mass litigation at the heart of the reorganization, and where other "unusual circumstances" are present.

RULE 29.6 STATEMENT

Dow Corning Corporation is 50% owned by Corning Incorporated and 50% owned by Dow Holdings, Inc., a wholly owned subsidiary of The Dow Chemical Company.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

Dow Corning's Chapter 11 bankruptcy proceeding has been pending for more than seven years. After years of negotiations among the relevant parties, the bankruptcy and district courts have approved an Amended Joint Plan of Reorganization ("Plan"). Over 94% of the hundreds of thousands of Dow Corning creditors who cast ballots voted in favor of the Plan. Among these creditors are more than 330,000 tort claimants who voted overwhelmingly to support the Plan, which sets aside $2.35 billion (net present value) to resolve their claims in full.

Notwithstanding the dramatic support for the Plan and the Plan's ability to pay all claims in full through settlement or litigation, 53 tort claimants from Nevada have petitioned this Court to grant review and, thereafter, issue a decision that would destroy the Plan and send Dow Corning and its creditors back to the drawing board.[1] Their petition wholly fails to satisfy the stringent standards for granting certiorari.

First, it is premature. Petitioners object to the legal standard adopted by the Sixth Circuit for permitting, in rare cases, the release of claims against non-debtors, but that court has remanded the case to the district court for additional findings in light of that standard. Petitioners have argued vigorously before the district court that the facts do not satisfy

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[1] Petitioners actually suggest that the Plan should somehow remain in place without the release provision challenged in their petition. The Plan itself, however, provides expressly that it shall not go into effect without the release provision, Plan § 7.2.1, and courts "cannot, sua sponte, modify [a] Chapter 11 plan." *In re Mcorp Financial, Inc.*, 137 B.R. 219, 228 (Bankr. S.D. Tex.), appeal dismissed, 139 B.R. 820 (S.D. Tex. 1992); see also *Memphis Bank & Trust Co.* v. *Whitman*, 692 F.2d 427, 431 (6th Cir. 1982).

the Sixth Circuit's criteria and that the Plan provision to which petitioners object therefore fails. The parties are currently awaiting further findings of fact from the district court, and a ruling in petitioners' favor would moot their certiorari petition.

Second, petitioners do not identify any appropriate grounds for certiorari review. The Sixth Circuit's decision permits a non-debtor release only in the rare case where a combination of enumerated "unusual circumstances" is present. Cases presenting such circumstances—where, among other things, a global release is necessary to resolve complex mass litigation requiring reorganization, is overwhelmingly supported by creditors, and injures no one because the plan provides for payment of all claims—have occurred only a handful of times. And in each instance, the lower courts have upheld the non-debtor release. Petitioners do not identify, and respondents are not aware of, any federal court that has refused a non-debtor release in such a case. Instead, petitioners rely on decisions involving more run-of-the-mill situations that would not have justified a non-debtor release under any standard, including that adopted by the Sixth Circuit in this case. Thus, not only are the courts of appeals in accord, but the Sixth Circuit's opinion does not conflict with any decision by this Court. Petitioners invoke *Callaway* v. *Benton* and *United States* v. *Energy Resources Co.*, but both decisions are consistent with the Sixth Circuit's ruling here. In short, nothing in the decision below warrants certiorari review.

STATEMENT OF THE CASE

Background

Dow Corning filed a voluntary petition for bankruptcy under Chapter 11 of the Bankruptcy Code in May 1995. By that time, Dow Corning had been involved in tort litigation with recipients of its silicone gel breast implants for several years. The United States Trustee appointed the Official Tort Claimants Committee ("TCC")—a respondent here—to represent the interests of several hundred thousand tort claimants in Dow Corning's bankruptcy case. After years of hard-fought litigation between the debtor and the TCC, the parties were finally able to agree, in the summer of 1998, on the outline of a plan of reorganization that would garner the TCC's support.

Agreement On A Plan

By the end of 1998, the parties had settled on the details of the agreed Plan and submitted it to the bankruptcy court for approval. Under the terms of the Plan, tort claimants are free to pursue either settlement or litigation. Dow Corning agreed to fund the "Settlement Facility" with up to $2.35 billion (net present value)—including an initial $985 million cash payment—with the size of claimants' recoveries dependent on the nature of their underlying medical conditions. Plan § 5.3; Amended Joint Disclosure Statement § 1.4. Although it is hotly disputed whether silicone implants cause disease, claimants can recover from the Settlement Facility without

having to prove that Dow Corning's implant products caused their alleged ailments.[2]

Claimants who opt for litigation will bring their claims against a "Litigation Facility," also created under the Plan and designed to mirror the existing tort system in all material respects. Dow Corning agreed to provide up to $400 million (net present value) of the overall $2.35 billion to pay tort claims (and related expenses) resolved in litigation against the Facility. Pet. App. 239a. The district court will develop, implement and monitor this claims resolution process, which will include ADR techniques designed to resolve claims more efficiently. C.A. Jt. App. 856-857, 1002. There was no challenge in the Sixth Circuit to the adequacy of the $2.35 billion being made available to resolve all claims, and the bankruptcy and district courts found that the $400 million set aside for litigation claims will satisfy all of those claims in

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[2] Petitioners assert that "debtor's culpability" for disease arising from the use of breast implants "is well established." Pet. 6 n.7. But the Ninth Circuit decision cited for this proposition, *Hopkins* v. *Dow Corning Corp.*, 33 F.3d 1116 (1994), merely upheld a 1991 jury verdict for a single implant recipient. Since *Hopkins*, certain reports of scientific experts have created a more difficult environment for claimants who wish to litigate disease claims. See, *e.g.*, *Meister* v. *Medical Engineering Corp.*, 267 F.3d 1123, 1124-1126, 1130-1131 (D.C. Cir. 2001). While the debtor and the TCC strongly disagree about the nature of the scientific evidence on disease causation, the agreement of the debtor and the Shareholders to give up their right to contest causation for settling claimants was a key component of the settlement negotiations that resulted in the Plan.

full. See Pet. App. 247a ("The evidence was overwhelming that $400 million net present value would be more than sufficient to pay all personal injury claims resolved through litigation in full even after factoring in the costs of the process"); *id.* at 139a (affirming bankruptcy court's finding that "the $400 million net present value funding of the Litigation Facility is almost five times what will be necessary to satisfy all the claims against the Litigation Facility").

Dow Corning Shareholders And The Plan's Release Provisions

Dow Corning's shareholders—Dow Chemical and Corning—are not manufacturers of silicone breast implants or other medical products. *In re Dow Corning Corp.*, 113 F.3d 565, 570 (6th Cir. 1997). They nonetheless agreed to the Plan, though it entailed substantial costs on their part, most significantly a $2.35 billion depletion of their equity in Dow Corning. The Plan also effectuates a compromise with respect to insurance policies co-owned with Dow Corning, pursuant to which hundreds of millions of dollars of insurance proceeds are made available to fund the Plan. Pet. App. 94a; C.A. Jt. App. 3515-3523. In addition, the Shareholders agreed to provide Dow Corning with a $300 million credit facility at below-market terms to help ensure that Dow Corning would have the liquidity to pay claimants in the first ten years of the Plan's operation, when cash demands are projected to be heaviest. C.A. Jt. App. 1313-1315. Pursuant to the Plan, the value derived from these concessions will help fund payments to tort claimants. The Plan provides a centralized mechanism to resolve all tort claims related to the debtor's products through settlement or litigation, and a single fund from which these claims would be paid in full. Pet. App. 7a-8a.

In exchange for these contributions, the Plan provides the Shareholders with a release against products liability claims relating to Dow Corning's products: "all Persons who have held, hold, or may hold Products Liability Claims, whether known or unknown, shall be deemed to have forever waived and released all such rights or Claims" against the Shareholders and certain other parties that contributed to the Plan—settling insurers and Dow Corning subsidiaries and affiliates. Plan § 8.3; Pet. App. 329a-330a. "[A]ll Persons who have held, hold, or may hold Released Claims * * * shall be permanently enjoined" from pursuing those claims against the released parties. Plan § 8.4; Pet. App. 334a.

Under the Plan, the alleged injuries that serve as the basis for claims against the Shareholders will be compensated through claims asserted in the Settlement and Litigation Facilities. Amended Joint Disclosure Statement § 6.7.C.1; Plan § 8.3. As a result, the Plan provides for payment in full for all alleged injuries arising from the debtor's products regardless of whether the claim was originally asserted against the debtor, any of its subsidiaries, an insurer, or a Shareholder.[3] *Ibid.*

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[3] It will actually be easier for a claimant to recover in the Litigation Facility than it would be to recover against a Shareholder. For example, a Nevada claimant seeking to recover against Dow Chemical would have to start by proving all of the elements of a claim against the debtor—namely, that the debtor's breast implants are defective or harmful and caused the claimant's injury—and then prove some additional elements against Dow Chemical. See *Dow Chemical Co.* v. *Mahlum*, 970 P.2d 98, 106, 107 (Nev. 1998) ("All of the

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Bankruptcy Court Approval

The Plan and a related Disclosure Statement were submitted to the bankruptcy court in November 1998. After additional negotiations with objecting parties and modifications to the documents, the court approved the Disclosure Statement and authorized the Plan's proponents to mail it and the Plan to creditors for a vote. Tort claimants voted overwhelmingly for the Plan. Over 94% of the more than 330,000 tort claimants who voted on the Plan cast favorable ballots. C.A. Jt. App. 411. Other classes likewise registered strong support for the Plan—*e.g.*, 91.4% among members of the Physicians' Class and 99% of the Health Insurer Class. *Ibid.* Some objectors remained, however, and the bankruptcy court considered their arguments in conjunction with a 12-day confirmation hearing in June and July of 1999. The court ultimately confirmed the Plan and overruled the objections in a confirmation order, findings and conclusions, and multiple opinions issued on or shortly after November 30, 1999. Pet. App. 309a-325a.

Notwithstanding its November 30 order confirming the Plan in its entirety, however, the bankruptcy court issued another opinion on December 21, 1999 that purported to limit the scope of the Plan's third-party release. Reasoning that it

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[3](...continued)
Mahlums' tort claims were based, ultimately, on the assumption that Mahlum's injuries were proximately caused by defective silicone breast implants," and "[t]he Mahlums had to show that Dow Corning was negligent or manufactured unsafe, defective breast implants *before showing that Dow Chemical was liable*") (emphasis added).

lacked the power to enforce the release against non-consenting creditors, the bankruptcy court read the Plan to shield third parties only from claimants who actually voted in favor of the Plan. Pet. App. 260a-285a.

District Court And Sixth Circuit Decisions

On appeal, the district court affirmed the confirmation order and ruled that the release and injunction provisions apply as written—*i.e.*, to all persons asserting claims relating to the debtor's silicone implant products, not just the claimants who voted in favor of the Plan. Pet. App. 74a-90a, 236a. Accordingly, the district court reversed the December 21 limitation imposed by the bankruptcy court on the third-party release. In upholding the release, the district court found that this case satisfied the "unusual circumstances test" under which, in "cases which involve mass litigation," courts have upheld non-debtor releases in bankruptcy plans against consenting and non-consenting creditors alike. *Id.* at 84a.

The Sixth Circuit affirmed in part and remanded for further factual findings. Pet. App. 24a. Regarding the bankruptcy court's authority to release the claims of non-consenting creditors against non-debtors, the court cited 11 U.S.C. § 105(a), which gives bankruptcy courts the power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." *Id.* at 11a. Moreover, the court observed, 11 U.S.C. § 1123(b)(6) allows a reorganization plan to "include any * * * appropriate provision not inconsistent with the applicable provisions of this title." *Ibid.* After reviewing the broad equitable powers available in bankruptcy, the court concluded that a non-consensual third-party release could be included in a plan of reorganization. The court then held that

such a release was an "appropriate provision" within the scope of § 1123(b)(6) if specific, extraordinary factors were present. Ultimately, the court concluded that "when a plan provides for the full payment of all claims, enjoining claims against a non-debtor so as not to defeat reorganization is consistent with the bankruptcy court's primary function." *Id.* at 11a-12a.

The specific factors required by the Sixth Circuit's decision to justify a non-consensual third-party release (the "unusual circumstances") are present in cases where:

> (1) There is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate; (2) The non-debtor has contributed substantial assets to the reorganization; (3) The injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor; (4) The impacted class, or classes, has overwhelmingly voted to accept the plan; (5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction; (6) The plan provides an opportunity for those claimants who choose not to settle to recover in full and; (7) The bankruptcy court made a record of specific factual findings that support its conclusions.

Pet App. 14a-15a.

The Sixth Circuit recognized that a non-consensual injunction is a "dramatic measure to be used cautiously," Pet.

App. 14a; hence the court's inclusion as the final factor the requirement that the facts on which the injunction is based must be stated with specificity. Here, the bankruptcy court had made findings on each of the elements of the test adopted by the Sixth Circuit. *Id.* at 315a. These findings were broadly stated, however. The Sixth Circuit held that the bankruptcy court's findings concerning the unusual circumstances test "were no more than conclusory statements" that were "not sufficiently specific and explained to support a finding of 'unusual circumstances.'" *Id.* at 15a. The court of appeals thus concluded that "the record produced by the bankruptcy court in this case does not support a finding of 'unusual circumstances' such that we can endorse enjoining non-consenting creditors' claims against a non-debtor," and the court therefore declined to affirm confirmation of the Plan and remanded the case to the district court for further findings.[4] *Id.* at 15a-16a, 24a. The district court has received full briefing on the remanded factual issues and heard oral argument on June 14. The parties are currently waiting for the district court to issue its findings.

REASONS FOR DENYING THE PETITION

Petitioners devote the bulk of their petition to a series of arguments on the merits of their position—that there are no circumstances in which a bankruptcy court may enjoin non-

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[4] The bankruptcy judge who oversaw Dow Corning's Chapter 11 proceedings and confirmed the Plan is no longer on the bench, and, as a result, the district court withdrew the reference of the case to the bankruptcy court. See 28 U.S.C. § 157(d). Accordingly, the district court will make any additional factual findings on remand.

consenting creditors' claims against non-debtors in a Chapter 11 reorganization. Petitioners nevertheless posit three reasons why they think the case warrants certiorari review: (1) the Sixth Circuit's opinion implicates a circuit split; (2) the decision is in conflict with this Court's decision in *Callaway* v. *Benton*; and (3) the Sixth Circuit relied on an impermissibly broad reading of this Court's decision in *United States* v. *Energy Resources Co.* All three arguments are incorrect.[5]

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[5] Petitioners also claim (at 24) that the non-debtor release in this case "raises serious and obvious due process concerns and smacks of totalitarianism" because it supposedly "decid[es] thousands of claims against creditors and in favor of the third party, without first hearing those claims and determining their merit." The Plan, submitted jointly by Dow Corning and the Tort Claimants Committee, does no such thing. On the contrary, the Plan provides for either voluntary settlement of claims or litigation in which claimants can obtain full compensation for their injuries.

For the same reason, petitioners' undeveloped reference (at 11) to *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815 (1999), creates no issue. Not only did that case deal with the very different issues implicated by limited fund class actions—which, the Court noted, lack the broader protections for creditors available in bankruptcy proceedings, *id.* at 860 n.34—but it also involved a proposed settlement in which claimants electing litigation were subject to a damage cap that prevented them from being paid in full. *Id.* at 847 n.23. In contrast, as noted earlier (pp. 4-5, *supra*), the bankruptcy court here found and the district court affirmed that the overall fund of $2.35 billion and the $400 million set aside for

(continued...)

As an initial matter, this case is an extremely poor candidate for certiorari solely by virtue of its procedural posture. The Sixth Circuit has remanded the matter to the district court for additional fact-finding that could moot the issue raised by petitioners here. At this point, the district court has taken the parties' respective arguments concerning the supplemental findings under advisement. Supreme Court review is inappropriate in this interlocutory posture.

In any event, petitioners identify no proper basis for certiorari review. The supposed "split" they describe among the courts of appeals is illusory. What they characterize as two schools of thought are merely the results flowing naturally from very different factual scenarios. Nor is there any tension, let alone conflict, between the Sixth Circuit's decision and this Court's opinions in *Callaway* and *Energy Resources*. *Callaway* is wholly inapposite and relies on jurisdictional principles that were superseded by statutory amendment decades ago. As for *Energy Resources*, the court of appeals invoked that decision only for two unremarkable and undisputed rules of law, hardly a "[m]istaken[] [e]xpan[sion]" of its "reach." Pet. 29.

I. The Sixth Circuit's Decision Is Interlocutory.

Petitioners ask this Court to review a decision remanding to the district court for further findings of fact. See Pet. App. 24a. Indeed, the non-debtor release that petitioners challenge will survive on remand only if the district court concludes that all seven of the Sixth Circuit's factors are satisfied and, if there is an appeal, the Sixth Circuit subsequently affirms that

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[5](...continued)
litigated claims were ample to satisfy all claims in full.

decision. Proceedings before the district court are ongoing, and, in those proceedings, petitioners have argued strenuously that the factual record will not support the findings the Sixth Circuit demands. While respondents disagree, the district court has yet to issue its decision, and the petition for certiorari will be moot if the district court or the Sixth Circuit rules in petitioners' favor.

That the Sixth Circuit's decision is interlocutory is alone grounds for denying the petition. See, *e.g.*, *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & A. R.R.*, 389 U.S. 327, 328 (1967) (per curiam) ("Petitioners seek certiorari to review the adverse rulings made by the Court of Appeals. However, because the Court of Appeals remanded the case, it is not yet ripe for review by this Court. The petition for a writ of certiorari is denied"); *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U.S. 251, 258 (1916) (concluding that substance of previous decision by court of appeals remanding for further proceedings was now properly before Court because previous decision was interlocutory and thus would not have been proper subject of Supreme Court review). There is no reason for this Court to consider an issue that may be mooted by intervening events.

II. The Sixth Circuit's Decision Does Not Implicate A Circuit Split.

With only minimal discussion, petitioners claim that "[t]he propriety of third party discharge provisions in chapter 11 bankruptcy plans is subject to fundamental and long standing differences in the circuits." Pet. 10-11 (footnote omitted). With even a cursory review of the cases in question, however, perceived differences in legal doctrine are quickly understood as the product of radically different factual

circumstances. Cases petitioners cite upholding non-debtor releases in the Second, Fourth, and Sixth Circuits involved mass litigation claims against the debtor and a combination of "unusual circumstances." In contrast, none of the Fifth, Ninth, and Tenth Circuit decisions on which petitioners rely involved mass litigation or the combination of factors deemed critical to courts on the other side of the supposed "split."

This Court has long recognized that "opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts." *Freeman* v. *Hewit*, 329 U.S. 249, 252 (1946), overruled in part on other grounds, *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977). Considered in that light, any apparent differences among the circuits quickly disappear.

A. Decisions Upholding Non-Debtor Releases Involve A Collection Of "Unusual Circumstances."

In *MacArthur Co.* v. *Johns-Manville Corp.*, 837 F.2d 89, 90 (2d Cir. 1988), the Chapter 11 debtor (Johns-Manville) manufactured asbestos products and declared bankruptcy in large measure because of its "potential liability to persons with latent asbestos-related disease." After Johns-Manville filed its bankruptcy petition, it settled suits with its insurance carriers over the scope of their coverage for asbestos-related injuries. Under the terms of the settlement, the carriers contributed $770 million (purportedly the policy limits) to the debtor's reorganization plan in exchange for their full release from any obligations arising under the disputed policies, which was enforced by permanently enjoining claims against the carriers. MacArthur, a Johns-Manville distributor, challenged the injunction, claiming that it was a co-insured under some of the

policies and might wish to bring suits against the carriers. *Id.* at 91.

The Second Circuit upheld the injunction. The insurance policies were property of the estate, the court reasoned, and the bankruptcy court's "authority to issue the injunction [was] * * * a corollary to [its] power to dispose of assets free and clear and to channel claims to the proceeds." *MacArthur,* 837 F.2d. at 93. "It has long been recognized," the court continued, "that when a debtor's assets are disposed of free and clear of third-party interests, the third party is adequately protected if his interest is assertable against the proceeds of the disposition." *Id.* at 94. Because MacArthur could bring any claims it would otherwise have against the insurers against the settlement fund instead, the bar on suits against the insurers was within the bankruptcy court's longstanding authority to channel creditors' claims to specified assets. The court found "[a]dditional authority for the injunction" in 11 U.S.C. § 105(a), which the court determined empowers the bankruptcy court "to enjoin suits that might impede the reorganization process." *Id.* at 93.

As in this case, the debtor in *MacArthur* was the target of mass tort claims and as here, the released non-debtors contributed substantially to the debtor's reorganization. Indeed, the contributions from Johns-Manville's insurers were critical to the reorganization, and the insurers would contribute these sums only if they received a release. 837 F.2d at 90; see also *In re Drexel Burnham Lambert Group,* 960 F.2d 285, 293 (2d Cir. 1992) (upholding injunction releasing debtor's officers and directors, in case involving a class of fraud claims against debtor, where the release was "a key component of [a] Settlement Agreement" that was, in

turn, "an essential element of Drexel's ultimate reorganization").

Likewise, the Fourth Circuit upheld a non-debtor release in *In re A.H. Robins Co.*, 880 F.2d 694 (4th Cir. 1989), another case that turned on the resolution of complex mass litigation against a debtor. Tort claimants in that case were users of the debtor's birth control products who challenged an injunction barring them from suing certain third parties—including Robins's officers and directors—for their injuries. *Id.* at 701. While a court-approved class settlement barred most of these claimants from bringing such suits in any event, the release affected claimants who had opted out of the class to pursue their claims individually. *Ibid.*

The Fourth Circuit relied on a combination of circumstances in upholding the release:

> the Plan was overwhelmingly approved, * * * the Plan in conjunction with insurance policies provided as a part of a plan of reorganization gives a second chance for even late claimants to recover [although], nevertheless, some have chosen not to take part in the settlement in order to retain rights to sue certain other parties, and * * * the entire reorganization hinges on the debtor being free from indirect claims such as suits against parties who would have indemnity or contribution claims against the debtor * * * .

Id. at 702. The court analogized the bankruptcy court's injunction to the "marshaling of assets" doctrine, which empowers a bankruptcy court to direct a creditor to satisfy its claim out of a particular fund. *Id.* at 701. Similarly, the Fourth Circuit held, the bankruptcy court was within its power

in limiting tort claimants to a choice between full recovery under the class settlement and compensation under the reorganization plan. *Ibid.*

In combination with the Second Circuit cases, *Robins* provided the Sixth Circuit with its list of "unusual circumstances" permitting a bankruptcy plan to enjoin claims against non-debtors. See Pet. App. 14a-15a. Among these circumstances is the requirement that the non-debtor provide valuable consideration to the reorganization, that this contribution play a critical role in the reorganization's success, and that the creditors whose claims against third parties are enjoined vote overwhelmingly in favor of the plan. Also crucial to the courts' decisions in *MacArthur*, *Robins*, and this case was the fact that, although claims against non-debtors were released, claimants could receive compensation for their asserted injuries. All three courts thus spoke not in terms of usurping claims but of using the Bankruptcy Code to pay claimants out of specified funds. See *MacArthur*, 837 F.2d at 94; *Robins*, 880 F.2d at 701; Pet. App. 11a.

B. Decisions Rejecting Non-Debtor Releases Do Not Involve Mass Litigation Or Provide For Payment Of Released Claims.

Cases petitioners cite from the Fifth, Ninth, and Tenth Circuits are not to the contrary. None of these cases entailed mass litigation against the debtor, and none of the reorganization plans at issue provided for full payment of the value of any barred claims or involved any of the other "unusual circumstances" that the Sixth Circuit and other courts require, such as a substantial monetary contribution that is essential for the reorganization to succeed.

Indeed, the Fifth Circuit case on which petitioners rely—*In re Zale Corp.*, 62 F.3d 746 (5th Cir. 1995)—expressly distinguished *Drexel* and *MacArthur* because the claimants in those cases could "recover[] from separate assets." *Id.* at 760. Not only did the Zale bankruptcy have nothing to do with mass tort claims, but "[t]he injunction at issue * * * provided no alternative means for [the claimants] to recover" the value of their claims against the released party. *Id.* at 761.

In re Western Real Estate Fund, Inc., 922 F.2d 592 (10th Cir. 1990) (per curiam), modified, 932 F.2d 898 (10th Cir. 1991), did not even involve a reorganization plan. The bankruptcy court in that case permanently barred an attorney who performed pre-bankruptcy work for the debtor from placing a lien against a non-debtor third party for his fees. The case did not involve any mass litigation, and no findings existed that the attorney would receive full compensation through the bankruptcy proceedings or that any of the other "unusual circumstances" were present.

Likewise, *In re Lowenschuss*, 67 F.3d 1394 (9th Cir. 1995), involved a single party whose claim against a non-debtor was barred by a bankruptcy court injunction. Here again, mass litigation was not at issue and the Ninth Circuit nowhere found that the plan itself would adequately compensate the party wishing to sue a non-debtor. See also *In re American Hardwoods, Inc.*, 885 F.2d 621, 626-627 (9th Cir. 1989) (noting that even if Ninth Circuit adopted the *Robins* approach to non-debtor injunctions, unusual circumstances present in *Robins* were absent in *American Hardwoods*).

In sum, the "split" of authority petitioners allege simply reflects stark factual differences, as the Third Circuit has recognized: Unlike in *Zale*, *Western Real Estate*, and *Lowenschuss*, "[a] central focus of [the] reorganizations [in *MacArthur*, *Drexel*, and *Robins*] was the global settlement of massive liabilities against the debtors and co-liable parties. Substantial financial contributions from non-debtor co-liable parties provided compensation to claimants in exchange for the release of their liabilities and made these reorganizations feasible." *In re Continental Airlines*, 203 F.3d 203, 212-213 (3d Cir. 2000); see also *In re American Family Enterprises*, 256 B.R. 377, 406 (D.N.J. 2000) ("Those courts which have approved the issuance of permanent injunctions and third-party releases have dealt with unusual cases such as mass tort claims, the resolution of which was reasonable, in the best interests of all parties, and which channeled all such claims to a particular fund provided in whole or in part by third parties"); *id.* at 408 ("[A] careful reading of [*Western Real Estate*, *American Hardwoods*, and *Lowenschuss*] reveals they are distinguishable and none of them involve any 'unusual or extraordinary circumstances'"). And perhaps most importantly, the injunctions at issue in petitioners' Fifth, Ninth, and Tenth Circuit cases simply barred claims against non-debtors without providing for full payment of the claimants' alleged harm, unlike the situation here.

Ignoring the dramatic factual distinctions described above, petitioners stress (at 18) the Ninth Circuit's language in *Lowenschuss* and similar cases to the effect that 11 U.S.C. § 524(e) itself bars a bankruptcy court from approving a non-debtor release in a plan of reorganization. But such language does not present a conflict worthy of certiorari review. By its plain terms, § 524(e) provides only that the discharge of the

debtor (provided in § 1141(d)) does not *itself* discharge non-debtors: "discharge of a debt of the debtor does not affect the liability of any other entity on * * * such debt." It simply does not address whether some other provisions of the Code permit third-party releases. The Sixth Circuit held that Bankruptcy Code § 1123(b)(6), coupled with § 105(b), provided the statutory basis for including a non-debtor release in a reorganization plan. The Sixth Circuit is the first court of appeals to address § 1123(b)(6) in this context—which itself indicates that there is no circuit split—and particularly when combined with the absence of a square conflict in comparable factual settings, this Court's review is not warranted.

As noted earlier, the district court has yet to decide whether this case involves the "unusual circumstances" necessary to justify a non-debtor release, and the Sixth Circuit has yet to review those findings. Until that occurs, it is unclear whether this case even presents the issues raised in the petition. But even if this is a case of "unusual circumstances," it still does not implicate a circuit split—respondents are aware of no court that has denied a third-party release under such conditions.

III. The Sixth Circuit's Decision Is Consistent With This Court's Decision In *Callaway* v. *Benton*.

The Sixth Circuit did not so much as mention *Callaway* v. *Benton*, 336 U.S. 132 (1949), and petitioners' reliance on that case is wholly misplaced. Petitioners invoke *Callaway* for the propositions that bankruptcy courts cannot choose to disregard state laws and that bankruptcy courts may not exert control over a creditor's "internal management." Pet. 26-27. But neither aspect of the *Callaway* decision has any bearing on this case.

Callaway was decided in 1949 under the now superseded Bankruptcy Act. It involved a reorganization plan under which South Western Railroad Company, which had been leasing property to the debtor, was required to sell the property to the debtor or have its lease disaffirmed and its property returned to it. 336 U.S. at 134. South Western's management encouraged shareholders to approve the sale, and management indicated that it would sell the property if a majority of its shareholders agreed. *Id.* at 135. Certain shareholders opposed this procedure on the ground that state law allowed management to consummate the sale only with the shareholders' *unanimous* support. *Id.* at 135-136.

The first portion of the *Callaway* decision on which petitioners rely (at 26) addressed the question whether South Western's sale to the debtor was governed by state or federal law. See 336 U.S. at 136-141. The Court recognized that federal law "specifically provides that the plan of reorganization shall be put into effect, 'the laws of any State or the decision or order of any State authority to the contrary notwithstanding.'" *Id.* at 141. In *Callaway*, however, "[t]here [was] * * * no occasion to override state law" as "[t]he [reorganization] plan implicitly accept[ed] it as controlling." *Ibid.* The Court was thus interpreting the plan; it was not holding, as petitioners would have it, that bankruptcy plans may not interfere with rights otherwise available under state law. On the contrary, the *Callaway* Court expressly recognized that state law must give way where necessary to a plan of reorganization. *Ibid.*; see also *Wright* v. *Union Central Life Ins.*, 304 U.S. 502, 517 (1938) ("Bankruptcy

proceedings constantly modify and affect the property rights established by state law").[6]

Petitioners' reliance on *Callaway* for the proposition that bankruptcy courts may not exercise control over a creditor's "internal management" is likewise inapposite. The district court in *Callaway* attempted to modify South Western's internal decision-making process by changing the level of shareholder support needed to sell corporate assets. The Dow Corning Plan does nothing of the sort. It merely establishes the options creditors have in pursuing payment, something done by every reorganization plan. Indeed, this is precisely what the *unchallenged* portion of the *Callaway* plan did when it directed South Western to choose between selling its property and losing its lease arrangement.

At the heart of the *Callaway* Court's restrictions on the powers of the district court was a concern over the court's jurisdiction. But the statutory basis for the Court's jurisdictional analysis has changed drastically since that case was decided. The Bankruptcy Act then in effect gave district courts exclusive jurisdiction over only "the debtor and its property wherever located." 336 U.S. at 142. What were plainly outside this jurisdictional grant then—"controversies that in some way affect the debtor's estate," *ibid.*—are at the

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[6] The Plan in this case does not give the bankruptcy court the "power to reverse the decisions of the highest courts of the 50 states," as petitioners (at 26) contend. Petitioners will be paid in full for any injuries caused by Dow Corning products under the Plan, and the Plan's third-party injunction prevents them only from suing third parties for the same injuries claimed against Dow Corning.

heart of today's much broader "related to" jurisdiction for bankruptcy cases. See 28 U.S.C. § 1334(b); see also *Celotex Corp.* v. *Edwards*, 514 U.S. 300, 308 & n.5 (1995) ("'Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate,'" including "suits between third parties which have an effect on the bankruptcy estate").

In short, *Callaway* has no bearing on the instant suit, and it is no surprise that the Sixth Circuit did not address it in its opinion, although *Callaway* was raised and argued at length in petitioners' Sixth Circuit briefs.

IV. The Sixth Circuit's Decision Is Consistent With This Court's Decision In *Energy Resources*.

Petitioners do not appear to contend that the Sixth Circuit's decision in this case contravenes anything the Court said in *United States* v. *Energy Resources Co.*, 495 U.S. 545 (1990). Petitioners argue only that the Sixth Circuit somehow "[m]istakenly [e]xpanded the [r]each" of that decision. Pet. 29. The Sixth Circuit cited *Energy Resources* only twice, however, each time for an unremarkable proposition that is undisputed here. The court of appeals quoted the rule that "bankruptcy courts, 'as courts of equity, have broad authority to modify creditor-debtor relationships.'" Pet. App. 11a (quoting *Energy Resources*, 495 U.S. at 549). Likewise, the Sixth Circuit cited *Energy Resources* for the proposition that, "[c]onsistent with section 105(a)'s broad grant of authority, the Code allows bankruptcy courts considerable discretion to approve plans of reorganization." Pet. App. 11a. Both statements are true to the *Energy Resources* opinion, and neither is in dispute.

Petitioners' claim that *Energy Resources* is factually distinguishable from the instant case is thus wholly irrelevant. And petitioners exaggerate this distinction in any event. In *Energy Resources*, "[t]he IRS was free to collect its debt directly from the third parties if it chose to do so," as petitioners state (at 30). But the IRS could take such action only if the debtor failed to pay the trust fund taxes. 495 U.S. at 547. Plan provisions requiring the IRS to credit payments from the debtor toward this debt first rather than apply the payments to non-trust fund liability (for which the third parties were not liable) thus provided the third parties with valuable protection from IRS action, and left the IRS "at risk for non-trust fund taxes." 495 U.S. at 551. As here, the third parties who received this protection—which this Court upheld—agreed "to advance enough money to rehabilitate the [debtor] corporation," but "only if the court would assure them that the reorganized corporation would pay its 'trust fund' tax debts [for which the third parties were jointly responsible] first." *In re Energy Resources Co.*, 871 F.2d 223, 230 (1st Cir. 1989) (Breyer, J.), *aff'd*, 495 U.S. 545 (1990). Far from conflicting with the Sixth Circuit's decision, therefore, *Energy Resources* plainly supports that decision.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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No. 01-1686

In the Supreme Court of the United States

CLASS FIVE NEVADA CLAIMANTS,
Petitioner,

v.

DOW CORNING CORPORATION, DEBTOR; OFFICIAL COMMITTEE OF TORT CLAIMANTS; THE DOW CHEMICAL COMPANY; CORNING, INCORPORATED; ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY BRIEF

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REPLY

Respondents raise two new allegations in their opposition, the first being that since the Sixth Circuit remanded the case to the bankruptcy court to determine whether its newly adopted six part third party discharge test was met, the petition may be mooted by those findings, and the second being that the Sixth Circuit's decision does not conflict with decisions in the Fifth, Ninth, and Tenth Circuits. Respondents are in error on both points.

1. Possibility of mootness does not preclude review.

The decision sought to be reviewed is a final judgment that the bankruptcy courts have authority to discharge non-debtors under certain circumstances, the remand relating only to the question of whether or not those circumstances exist under the facts developed at this stage of this case and under the present version of proponents' plan, a matter which the bankruptcy court is wholly without authority to determine and a matter which, in a case already pending for over 7 years, will likely and unnecessarily add at least another three years of delay, whichever way the bankruptcy court rules. Respondents' argument would presumably be the same had the sixth circuit empowered its bankruptcy courts to grant divorces, or coin money, both less remarkable than granting bankruptcy courts the power to permanently enjoin a creditor from seeking to hold a solvent third party liable for his own misconduct without first hearing the merits of the claim, and then saying that review by this court is precluded unless the court actually granted the divorce or printed its own currency. Though certiorari review of interlocutory orders of federal courts is available (28 U. S. C. §§1254(1) and 1292) it is true that "[w]e generally await final judgment in the lower courts before exercising our certiorari jurisdiction." *Virginia*

Military Institute et al., v. United States 508 U.S. 946 (1993) (J. Scalia, concurring).

Nonetheless in extraordinary cases, review of interlocutory judgments is available:

> Clearly, therefore, this court should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.

American Construction Company v. Jacksonville, Tampa and Key West Railway Company, 148 U.S. 372, 384 (1893)

This is such a case. Most of the claimants in this case have waited 9 years already (two years before 1995 when debtor below filed for bankruptcy). Further delay would embarrass the judiciary, or at least should. Justice delayed is justice denied. To grant petitioners the relief they seek (right to continue their pending state law actions against Dow Chemical) three years from now will be illusory as too many of them and their witnesses will, if not then dead, be nearly so. The federal judiciary is not a black hole in which to stuff the Nevadans, as respondents would have it.

If the bankruptcy court finds each of the six factors, and is upheld on appeal, the plan is then confirmed with the releases and no mootness sets in. If the bankruptcy court finds less than six of the factors, and is upheld on appeal, the petition is still not moot as Dow will claim that the plan is not effective and a new one must be drafted, that it should have an opportunity to draft a new plan to more properly meet the six factor test as those factors were not in existence when the present plan was filed. And on and on.

Further, it is not at all certain, in the context of bankruptcy law, that the Sixth Circuit's decision is

interlocutory. For purposes of effective review by this Court, it is about as final as a bankruptcy decision gets. In fact, by reason of the application of bankruptcy law principles rendering most appeals of orders confirming plans moot, where no stay is obtained, it is much more likely that mootness will prevent review if this petition is denied than if it is granted.

Section 7.2 of the plan, earlier lodged with this Court, provides that the plan becomes effective when the third party discharge issue is resolved in favor of proponents and is no longer subject to "appeal."

As a petition for certiorari is not an "appeal," the plan apparently becomes effective on final approval of the confirmation order by the Sixth Circuit. If it is confirmed and the effective date occurs, as above, the plan provides that disbursements begin immediately and, once implemented, appellate review is precluded by the special doctrine of mootness applicable to confirmed plans. See *City of Covington v. Covington Landing Ltd. Partnership*, 71 F.3d 1221, 1226 (6th Cir. 1995) (citing *In re UNR Indus.*, 20 F.3d 766, 769-70 (7th Cir. 1994) (recognizing that a plan of reorganization, once implemented, should not be disturbed except for compelling reasons).

By reason of the special nature of bankruptcy cases, the courts have developed special rules of finality.

> The problems of applying the final judgment rule to bankruptcy litigation with its numerous parties in interest and its adversary proceedings and contested matters makes 'The question of finality in bankruptcy appeals ... a thorny one,' although most courts agree that the concept of finality in bankruptcy is broader and more flexible than in ordinary civil litigation, and that determinations of finality in the context of

bankruptcy are dealt with 'in a more pragmatic and less technical sense than in other settings.'

Collier on Bankruptcy, 15th Ed. ¶5.07[1][a]

The two interlocutory judgment cases cited by respondents (*Brotherhood of Locomotive Firemen & Enginemen v. Bangor & A. R.R.*, 389 U.S. 327, (1967) and *Hamilton-Brown Shoe Co. v. Wolf Bros.*, 240 U.S. 251 (1916) provide good examples of the reasons for this rule. Not only did they, so far as can be determined, not involve, as here, an allegation that the remanded court had no authority to conduct the remanded proceedings, certiorari was not necessary to prevent needless and destructive delay. In *Brotherhood*, the contemptuous conduct occurred on March 31, 1966. Certiorari was denied December 11, 1967. In *Hamilton-Brown*, the complaint was filed in January of 1906 and certiorari was denied in April of 1909. *(Heckendorn v. The United States*, 214 U.S. 514 (1909)).

2. **Respondents' argument that the Sixth Circuit's decision does not implicate a split among the Circuits misrepresents the nature of that decision.**

The reader is left with the impression, on reviewing respondents' brief, that the main requirement of a third party release is a mass tort and that, in mass tort cases, the Circuits are all in accord. This is false and misleading. The Sixth Circuit carefully did **not** make "mass tort" one of the six elements which bankruptcy courts must find before confirming a plan which discharges nondebtors. To do so, to make "mass tort" a seventh element would be to give debtors who injure thousands the right to request a third party bankruptcy discharge while denying that right to debtors who injure only a few. The Nevadans claim that the Sixth Circuit's decision is unauthorized and unAmerican, not that it is

depraved. The Sixth Circuit's six elements operate without regard to whether the bankruptcy court is or is not considering a mass tort bankruptcy, and without regard to the number or type of claims. In this, as the Sixth Circuit itself expressly acknowledges, it is in direct conflict with at least the Ninth and the Tenth Circuits. *In re: Dow Corning Corporation, Debtor.* 280 F.3d 648, 657 (2002).

And it is also untrue that those Circuits which authorize bankruptcy courts to issue third party discharges do so only in mass tort cases. For examples of such non-mass tort/third party discharge cases in the Second Circuit, see *In re Gaston & Snow*, 1996 U.S. Dist. LEXIS 17774 (U.S.D.C.S.D.N.Y., 1996) (law firm liability); *In re Chateaugay Corporation*, 167 B.R. 776 (U.S.D.C.S.D.N.Y, 1994) (workers' compensation claims). For just one of many examples of such cases in the Fourth Circuit, see *In Re: Mac Panel Company* 2000 Bankr. LEXIS 1694 (Bankr. M.D.N.C., 2000), aff'd 283 F.3d 622, 626 (4th Cir. 2002) (There was only one creditor, the bankruptcy court noting: "The recognition of bankruptcy court jurisdiction in the *A. H. Robins* case is not rendered inapplicable in the present case on the grounds that mass tort litigation was involved in the Robins case," 2000 Bankr. LEXIS 1694 at p.23).

SUPPLEMENTAL MATTERS

1. The United States may seek certiorari of the decision.

Earlier this month the United States (Sixth Circuit companion case No. 01-1102) filed herein an Application for an Extension of Time to File a Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit seeking to preserve its right to seek certiorari of the same Sixth Circuit decision invoked by this petition, unless it and the plan proponents finalize pending settlement

negotiations. Throughout this litigation, the Nevadans and the United States have been closely aligned on the "authority" issue, the main difference, if it be one, being that the United States' rights against third parties abrogated by the Sixth Circuit were granted by federal rather than state law. That application attaches the Sixth Circuit's judgment (280 F.3d 648), and states, beginning at the bottom of page 6:

> Additional time is needed so that the Solicitor General may further evaluate the legal and practical consequences of the decision and, if the petition is authorized, to prepare and print it.
>
> First and most important, the United States is engaged in substantial and thus far productive settlement discussions with Dow Corning. Additional time is needed to determine whether a settlement in lieu of a request for further review is feasible and in the interests of the United States.
>
> Second, the scope of a bankruptcy court's equitable power to curtail a creditor's rights against parties other than the debtor presents a complex issue of substantial prospective significance. The significance of the issues presented requires additional time for consultation and consideration within the government.
>
> Finally, there is a considerable divergence in appellate authority on this question. Compare Matter of Zale Corp., 62 F.3d 746, 760 (5th Cir. 1996); In re Lowenschuss, 67 F.3d at 1401, In re American Hardwoods, Inc., 885 F.2d 621, 626 (9th Cir. 1989), and In re Western Real Estate, Inc., 922 F.2d at 601-02, with In re A. H. Robins, Inc., 880 F.2d 694, 702 (4th Cir.), cert. denied, 493 U.S. 959 (1989), and In re Drexel Burnham Lambert Group, Inc., 960 F.2d

285, 293, cert. denied, 506 U.S. 1088 (1993). The complexity of the issue and divergence in results and reasoning in the courts of appeal require additional time to determine whether to request further review of the issue at this time.

Zale, Lowenschuss[1], and *In re Western Real Estate* are cited at page 16 of the petition. *Robins* and *Drexel Burnham* are cited at page 19 of the petition.

2. **WorldCom**

WorldCom is a Mississippi corporation based in Clinton, Mississippi. On July 21, 2002, WorldCom filed its chapter 11 petition. It filed in the release friendly Second Circuit (see *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 293 (2nd Cir. 1992)), rather than in its home Circuit, the release unfriendly Fifth Circuit (*In re Zale Corporation,* 62 F.3d 746, 761 (5th Cir. 1995)). Schedule 7 to the affidavit of WorldCom's Senior Vice President and Treasurer, Ms. Susan Mayer, entitled "Location Of The Debtors' Substantial Assets In The United States, And The Nature, Location, And Value Of Any Assets Held By The Debtors Outside The Territorial Limits Of The United States," filed with the WorldCom bankruptcy petitions (Jointly Administered Cases Nos. 02-13532 and 02-13533, United States Bankruptcy Court Southern District Of New York), provides:

> Substantially all of the Debtors' corporate books and records are located at the corporate headquarters of WorldCom, Inc., 500 Clinton Center Drive, Clinton, Mississippi 39056.

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[1] It is noted that certiorari was also denied in *Lowenschuss* at 517 U.S. 1243 (1996).

> WorldCom has assets in every location from which it operates its businesses, including every state domestically and 65 foreign countries in North America, Europe, the Middle East, Africa, Latin America, Australia and Asia.

See that court's website (http://www.nysb.uscourts.gov/) (WorldCom Inquiries) at http://www1.worldcom.com/external/infodesk/pdfs/1007_affidavit.pdf.

Collier comments on the venue requirements set forth in §1408 of Title 28, U.S.C.:

> The venue provision looks to the domicile, residence, principal place of business or place of principal assets in the United States. Section 1408 and Federal Rule of Bankruptcy Procedure 1014 recognize that the debtor's principal place of business may not be the location of its principal assets. When the debtor maintains its executive offices in one jurisdiction and its production facilities or other principal assets in another, either location may be a proper venue if the debtor's affairs are actually managed from the executive offices.

Collier on Bankruptcy, 15th Ed., ¶1014.02 [1].

The WorldCom filing is further support for petitioners' argument that the Circuit split on the issue of whether bankruptcy courts have authority to discharge non-debtors may be leading to a form of forum shopping which is particularly inimical to the national interest (Petition, p. 13).

Respectfully Submitted this 29th day of July, 2002.

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